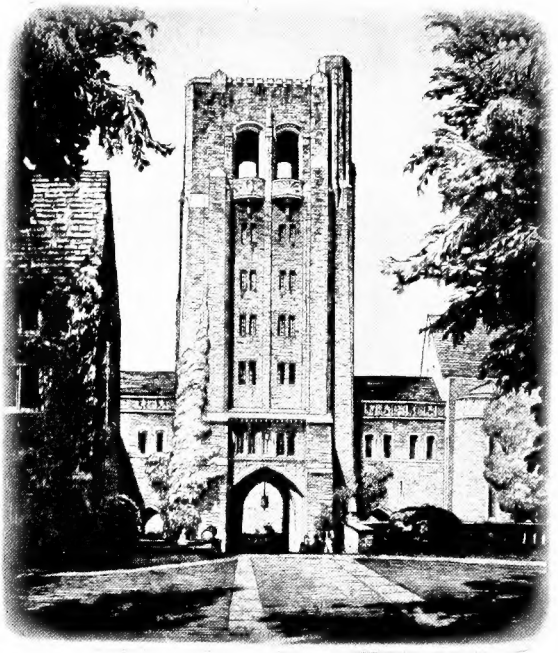


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A TREATISE

ON

EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES

UNDER THE REFORMED PROCEDURE.

By JOHN NORTON POMEROY, LL.D.

IN THREE VOLUMES.

VOL. II.

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TO

STEPHEN J. FIELD, LL.D.,

ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Not only as a tribute to his eminent public services in the most august tribunal of any modern nation; but also as an acknowledgment of his private friendship, and of the author's esteem and respect,

THIS WORK IS DEDICATED.

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TREATISE

ON

EQUITY JURISPRUDENCE.

TREATISE

ON

EQUITY JURISPRUDENCE.

SECTION IV.

CONCERNING PERFORMANCE.

ANALYSIS.

§ 578. Rationale.
§ 579. Definition.
§§ 580–583. I. Covenant to purchase and settle or convey.
§ 580. General rule: Lechmere v. Earl of Carlisle.
§ 581. Forms of covenant to which the rule applies.
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§§ 588–590. Meritorious or imperfect consideration; theory of.
§§ 589, 590. Defective execution of powers, relief of.
§ 590. Requisites for such relief; a partial execution necessary.

§ 578. **Rationale.**—The equity of Performance has a close resemblance to that of Satisfaction, and the two have sometimes been confounded; yet there is a clear and essential distinction between them. Both, however, as well as the doctrine of Election, ultimately rest, as it seems to me, upon that broad principle of equity which refuses to admit double benefits to a single recipient, by raising a presumption that only one benefit was intended. Where A. is under a prior obligation to bestow a particular kind of thing upon B., and he afterwards bestows upon B. a different kind of thing, the question arises, whether the latter benefit was *intended* as a substitute for the prior

obligation?[1] The whole would turn upon the donor's intention, although that intent might be presumed. If the second benefit was thus intended as a substitute, it would be a *satisfaction*, and not a performance; the prior obligation would be satisfied, but not performed. Equity would not permit the recipient to claim both benefits; but since he is not bound to accept the satisfaction of the obligation existing in his favor, he is entitled to elect between them. On the other hand, where A. is under some positive obligation, as a covenant, to bestow a particular kind of thing upon B., in a certain specified manner, as by conveyance, or by will, and instead thereof he either voluntarily bestows the same kind of thing upon B. in a different manner, or else permits the same kind of thing to devolve upon B. by operation of law, as by descent, or by succession, there is clearly no substitution, and therefore no satisfaction. Equity, however, sees in such a transaction no indication of an intent that the recipient is to enjoy double benefits; it rather sees a contrary intention. If the benefit actually given to, or permitted to devolve upon B., was not intended to be a bounty, and was not a substitute for, and satisfaction of the prior obligation, then it can only be regarded as a performance, and A. must be presumed to have intended to perform the very duty which he owed to B. In such a case, B. obtains the very benefit which he had a right to demand, the fulfillment of the very obligation existing in his favor, and he has therefore no election. To sum up: In satisfaction a different kind of thing is given, with the intention that it shall be accepted as a substitute for and in lieu of the benefit due by the terms of the original obligation; and the donee has, in general, a right of election. In performance, the same kind of thing is either conferred in a different manner, or is left to devolve by operation of law, with the intention of thereby fulfilling the very terms of the original obligation; and there is no right of election on the part of the recipient. While this particular doctrine concerning performance ultimately rests, in my opinion, upon the equitable principle of antagonism to double benefits, it is undoubtedly the immediate and direct result of the maxim, Equity imputes an intention to fulfill an obligation. To this maxim the doctrine has generally been referred by text-writers and judges.[2]

[1] See quotation from Goldsmid v. Goldsmid, 1 Sw. 211, *ante*, in vol. 1, n. (2) under § 521.

[2] For an explanation of the maxim, and its effect upon this and other doctrines, see *ante*, vol. 1, §§ 420–422.

§ 579. **Definition.**—From the foregoing analysis it appears that the equity of Performance should be defined, or rather described as follows: When a person has definitely bound himself to do a certain act, by which a particular kind of thing will be bestowed upon another in a specified manner, and instead thereof he either bestows the same kind of thing upon the obligee in a different manner, or else permits the same kind of thing to devolve upon the obligee in course and by operation of law, so that what is thus done or permitted may amount to a complete or partial fulfillment of the existing obligation, then the party will be presumed to have done or permitted this with *the intention* of performing the very obligation itself in whole or in part, and the obligation will be thus wholly or partially performed, as the case may be.[1] Equity imputes to the party an intention of fulfilling the obligation resting upon him, rather than the intention of violating that duty, or of conferring a mere bounty. Equity thus says, not only that a man should be, but that he is, just before he is generous. The cases involving this doctrine may be arranged, for purposes of convenience, into two classes: (1) Where a person covenants to purchase and settle, or to purchase and convey lands, and he afterwards purchases such lands without expressing any purpose for which the purchase is made, and does not convey or settle them in pursuance of his covenant. (2) Where a person covenants to leave property by will, and he does not make the bequest, but on his death the covenantee receives the same kind of property by succession. These two classes will be examined separately.

§ 580. **I. Covenant to Purchase and Settle or Convey.** Where a person covenants to purchase lands and settle, or to purchase lands and convey them, and he afterwards purchases lands answering to the description—that is, of the same estate and tenure—without expressing the object or purpose of making the purchase, and he does not convey or settle in accordance with the terms of his covenant, but dies, leaving the lands as part of his estate, and they devolve by descent upon the covenantee as heir-at-law, then the purchase and suffering the lands to descend will be presumed to have been with the inten-

[1] Wilcocks v. Wilcocks, 2 Vern. 558; Blandy v. Widmore, 1 P. Wms. 324; 2 Vern. 709; 2 Eq. Lead. Cas. 833 (4th Am. ed.); Lechmere v. Earl of Carlisle, 3 P. Wms. 211, 227; Deacon v. Smith, 3 Atk. 323; Sowden v. Sowden, 1 Bro. Ch. 582; 3 P. Wms. 228, n.; Goldsmid v. Goldsmid, 1 Sw. 211. The definition given by some writers is, as it seems to me, faulty, since the terms are so broad and general, that they necessarily include satisfaction as well as performance. See, for example, Snell, Eq., p. 193.

tion of performing the covenant in whole or in part; the acquisition of the lands by inheritance will be a total or partial performance, as the case may be; the covenantee-heir can not specifically enforce the covenant, so far as it has thus been performed, against the covenantor's estate.[1]

[1] Wilcocks v. Wilcocks, 2 Vern. 558; 2 Eq. Lead. Cas. 833; Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Deacon v. Smith, 3 Atk. 323; Tooke v. Hastings, 2 Vern. 97; Sowden v. Sowden, 1 Bro. Ch. 582; Wilson v. Piggot, 2 Ves. 351, 356; Mathias v. Mathias, 3 Sm. & Giff. 552; Mornington v. Keane, 2 De G. & J. 292. The opinion in Lechmere v. Earl of Carlisle, *supra*, has uniformly been regarded as a complete and accurate statement of the entire doctrine; subsequent decisions have simply repeated and applied its reasoning. I shall, therefore, quote from this case at some length; there is, in fact, but little more to be added for a full exposition of the doctrine. Lord Lechmere, upon his marriage, covenanted to lay out, within a year after the marriage, £30,000, in the purchase of *freehold lands, in possession*, with the consent of certain trustees named. The lands thus purchased he covenanted to settle in a certain manner, among other things, so as to secure an income of £800 for his wife, and with remainder in all the lands to his eldest and other sons in tail, remainder to himself and his heirs. At the time of his marriage, Lord Lechmere owned some lands in fee. After his marriage he purchased some estates in fee of about £500 per annum, some life estates, some reversions in fee expectant on prior life estates, and *contracted* for the purchase of some other estates in fee in possession. None of these purchases were made after consultation with or with consent of the trustees named. He died intestate, without making any settlement. Mr. Lechmere, his heir at law, to whom all his estates in fee descended, filed a bill for a specific performance of the covenant, praying that the administrators be compelled to lay out £30,000 of the personal estate of the deceased in purchase of lands, as agreed by the covenant. The Master of Rolls decreed in favor of a specific performance, holding that none of the lands purchased by Lord Lechmere, and inherited by the plaintiff, were in part performance of the covenant. On appeal this decree was reversed by Lord Chan. Talbot, so far as related to the estates in fee purchased after the covenant and suffered to descend; such estates were to be considered as purchased in part performance of the covenant. On this subject the chancellor said: "As to questions of satisfaction, where they are properly so, they have always been between debtor and creditor, or their representatives. [This statement is not exactly accurate, as the doctrine of satisfaction is now understood. See preceding section on satisfaction.] As to Mr. Lechmere, I do not consider him as a creditor, but as standing in the place of his ancestor, and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. [He further explains "satisfaction."] But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of Lord Lechmere in the purchase made after the articles; for as to all the estates purchased precedent to the articles, there is no color to say they can be intended in performance of the articles; and as to the leaseholds for life, and the reversion in fee expectant on the estates for life, it can not be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee-simple in possession, etc.), though considered as a satisfaction to a creditor, yet they do not answer because they are not of equal or greater value [*i. e.*, they do not answer *as a satisfaction*]. Yet why may they not be intended as bought by him with a view to make good the articles? Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. But it is said the lands are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases; and the want of

§ 581. **Forms of the Covenant.**—The doctrine is not confined in its operation to any particular form of covenant. It applies where a person, at the time owning no real estate, covenants to convey and settle, and he afterwards purchases land, but does not convey nor settle it;[1] where the covenant is merely to settle lands;[2] and where the covenant is to pay a sum of money to trustees, to be laid out by them in lands, and the covenantor afterwards purchases an estate which he does not settle nor convey to the trustees.[3] The doctrine has also been extended to the case where the obligation to purchase and settle lands arose from a statute.[4] Wherever such covenants are per-

this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles. It is objected that the articles say the lands shall be conveyed immediately. It is not necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles. Whoever is entitled to a performance of the covenant, the personal estate must be first applied so far as it will go; and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out £30,000 in lands, and he lays out part as he can find purchases, which are attended with all material circumstances, it is more natural to suppose those purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under than to a voluntary act independent of the obligation. Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance; and that seems to me rather his intention than to enlarge his real estate. The case of Wilcocks v. Wilcocks, though there are some circumstances that are not here, yet it has a good deal of weight with me. * * * It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass; and it is not an objection to say they are of unequal value, for a covenant may be performed in part, though it is not so in satisfaction; and in this particular I differ from the Master of Rolls. There must be an account of what lands in fee simple in possession were purchased after the articles entered into, and so much as the purchase money of such lands amounts to must be looked on in part satisfaction [performance] of the £30,000 to be laid out in land under the articles, and the residue of the £30,000 must be made good out of the personal estate." In the leading case of Wilcocks v. Wilcocks, *supra*, A. covenanted on his marriage to purchase lands of £200 a year value, and settle them for the jointure of his wife, and to his first and other sons in tail. He purchased lands of that value, but made no settlement, and on his death the lands descended to his eldest son. The eldest son filed a bill for a specific enforcement of the covenant, but it was held that the purchase and descent were a full performance, so that the bill stated no case for relief.

[1] Deacon v. Smith, 3 Atk. 323; and see Wellesley v. Wellesley, 4 My. & Cr. 561; but see observations on this case in Mornington v. Keane, 2 De G. & J. 292.

[2] Tooke v. Hastings, 2 Vern. 97; Powdrell v. Jones, 2 Sm. & Giff. 335.

[3] Sowden v. Sowden, 1 Bro. Ch. 582; 3 P. Wms. 228, n.

[4] Tubbs v. Broadwood, 2 Russ. & My. 487. The statute in this case was a private act authorizing a tenant for life to sell a settled estate, but requiring him to lay out the proceeds in the purchase of other lands, and to settle them upon the same uses. He bought lands, but died without making any settlement of them.

formed in whole or in part by a descent of the lands to the covenantee, they are, for the same reason, performed by a devise of the lands to him from the covenantor.[1]

§ 582. **Special Rules.**—The following special rules have been settled in connection with all these forms of covenant, which either expressly or impliedly look to a future purchase and conveyance or settlement of lands by the covenantor. Where the covenant specifies the value of the lands to be purchased, a purchase of less value operates as a performance *pro tanto*.[2] In such a covenant, it can not be presumed that lands which the covenantor owned at the time of making it, and which he suffers his heir to inherit, were intended to be acquired by the heir in performance of the obligation.[3] Also, if the covenantor purchases property of a different nature—different estate or tenure—from that mentioned in the agreement, no presumption of an intention to perform arises.[4] A provision that the purchase is to be with the consent of trustees named, is not material, provided that the purchase is otherwise a proper one, and conforms to the terms of the covenant.[5]

§ 583. **No Lien Created.**—A covenant to purchase and convey or settle, or to convey and settle, lands generally, without specifying any parcel or tract of land in particular, although it may give rise to the presumption that any particular lands subsequently purchased were intended to be in performance of the obligation, does not create a lien upon such lands afterwards purchased, in favor of the covenantee, and consequently a mortgagor or purchaser of those lands, even with notice, is not affected by it; the covenantee can not enforce the covenant upon the lands in the hands of such mortgagor or purchaser.[6] In other words, while the purchase by the covenantor raises a presumption that he intended thereby to perform, this presumption may be overcome or destroyed by his conveyance of the land to a third person.

[1] Wilson v. Piggott, 2 Ves. 351, 356; 1 Watson's Compend. of Eq., p. 609.

[2] Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Lechmere v. Lechmere, Cas. temp. Talbot, 80; Sowden v. Sowden, 1 Bro. Ch. 582; 3 P. Wms. 228, n.

[3] Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Lechmere v. Lechmere, Cas. temp. Talb. 80; see Warde v. Warde, 16 Beav. 103.

[4] Lechmere v. Earl of Carlisle, *supra;* Lechmere v. Lechmere, *supra;* Deacon v. Smith, 3 Atk. 323; Pinnell v. Hallett, Ambl. 106; Att'y-Gen. v. Whorwood, 1 Ves. sen. 534, 540.

[5] Lechmere v. Earl of Carlisle, *supra.*

[6] Mornington v. Keane, 2 De G. & J. 292; Deacon v. Smith, 3 Atk. 323. In the case of Mornington v. Keane, *supra*, the subject is examined with great care, the prior decisions are all compared, explained, and limited, especially that of Roundell v. Breary, 2 Vern. 482, and the rule as stated in the text is settled. See Pinch v. Anthony, 8 Allen, 536.

§ 584. **II. Covenant to Bequeath Property.**—In this second class of cases to which the doctrine applies, if a person covenants to leave, or that his executors shall pay, to a designated individual, a sum of money, or a part of his personal estate, and the covenantor afterwards dies intestate, and the individual becomes entitled to a distributive share of the personal property equal to or greater than the amount agreed to be left or paid, then such share will be a full performance of the covenant, and the beneficiary can not claim both; if the share is less than the amount agreed, it will be *pro tanto* a performance. In order, however, that the case may fall within the doctrine, and the distributive share be a total or partial performance, the covenant must be such that it is broken, if at all, at or after the covenantor's death. That the devolution of the share is a performance under these circumstances, and not a mere satisfaction, is expressly held in several of the decisions.[1] The covenants which have ordinarily belonged to this class have been those made by husbands to leave money or property to their wives, but there are no grounds, upon principle, for confining the rule to this particular species of agreements.

§ 585. **Limitations—When Covenant Creates a Debt in the Life-time of Deceased.**—The courts have been careful not to extend the rule controlling this class of cases to circumstances in which the reasons for it do not apply. Where

[1] Blandy v. Widmore, 1 P. Wms. 324; 2 Vern. 209; 2 Eq. Lead. Cas. 834, 842 (4th Am. ed.); Lee v. D'Aranda, 3 Atk. 419; Garthshore v. Chalie, 10 Ves. 1; Goldsmid v. Goldsmid, 1 Sw. 211; Barrett v. Beckford, 1 Ves. sen. 519; 1 P. Wms. 324, n. (1); Thacker v. Key, L. R. 8 Eq. 408. In Goldsmid v. Goldsmid, *supra*, which was a case of intestacy, because the will had failed to be operative, the Master of Rolls, Sir Thos. Plumer, after commenting upon the prior authorities cited above, and after distinguishing the case of a distributive share devolving upon the covenantee, from that of a legacy bestowed upon him, said: "Lord Eldon, in Garthshore v. Chalie, 10 Ves. 1, speaking of Blandy v. Widmore and other cases, says, 'These cases are distinct authorities that where a husband covenants to leave or to pay at his death a sum of money to a person who, independent of that agreement, by the relation between them and the provision of law attending upon it, will take a provision, the covenant is to be construed with reference to that.' Considering the contract as made with that reference, it must be interpreted as intended to regulate what the widow is to receive; and consequently when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage contract, she in fact obtains from the administrator that sum, the court is bound to consider that as payment under the covenant. These are not cases of an ordinary debt; *during the life of the husband there is no breach of the covenant, no debt;* the covenant is to pay *after* his death, and the inquiry is not whether the payment of the distributive share is a *satisfaction*, but a question perfectly distinct, *whether it is a performance.*"

the covenant is such that it must be performed during the covenantor's life-time, and the breach occurs before his death, a distributive share does not operate as a performance, either in whole or in part. The breach of such a covenant creates an ordinary *debt* due from the deceased, and it is well settled that a distributive share of the debtor's estate devolving upon the creditor can not be treated as a payment of his demand. An illustration of such agreements is a covenant by a husband to pay a certain sum to his wife within two years from their marriage; he outlives the two years, and dies intestate, without having made the payment, and leaving a large distributive share to devolve upon her. She is entitled both to her distributive share and to the sum due from the estate to her as a creditor.[1] Also, where the covenant is not to leave or pay a certain specified sum in gross, but is to give an annuity for life, or the annual interest on a named amount for life, the doctrine of performance has been held not to apply.[2]

§ 586. **A Legacy not a Performance.**—The devolution of a distributive share in performance of a covenant to pay or leave money at the covenantor's death, should be carefully distinguished, in its effects, from a legacy. If a husband has made such a covenant to leave or pay to his widow a certain sum of money, a bequest which he may give to her *simpliciter*, either of a definite amount, or of the whole or a part of a residue, without any provision in the will expressly showing an intention on his part that the gift was to be in payment, will not operate as a performance of the covenant; a legacy is *prima facie* a bounty, and gives rise to a presumption that the testator intended to increase the provision made for his widow by the covenant, and not to pay and discharge it.[3] This particular situation suggests the importance of distinguishing, in general, between the cases of *performance* discussed in the foregoing paragraphs, and the cases of *satisfaction* of debts by legacies considered in the preceding section. The essential differences between satisfaction and performance have already been sufficiently pointed out. The instances of satisfaction of debts by legacies involve and depend upon certain presumptions which

[1] Oliver v. Brickland, cited in 1 Ves. sen. 1, 12; 3 Atk. 420, 422; Lang v. Lang, 8 Sim. 451; and see Garthshore v. Chalie, 10 Ves. 1, 12, per Lord Eldon.

[2] Couch v. Stratton, 4 Ves. 391; Salisbury v. Salisbury, 6 Hare, 526; Young v. Young, 5 I. Rep. Eq. 615.

[3] See Haines v. Mico, 1 Bro. Ch. 129; Devese v. Pontet, 1 Cox, 188. It should be remembered that there are no presumptions against double portions between a husband and his widow. See the preceding section on "Satisfaction."

do not exist in cases of performance. "In cases of satisfaction [*i. e.*, satisfaction of debts by legacies], the presumption will not hold where the thing substituted is less beneficial (either in amount, or certainty, or time of enjoyment, or otherwise), than the thing contracted for, since satisfaction implies the doing of something *equivalent*, and the presumption is so much weakened where the thing *substituted* is not equivalent to the thing *contracted for*, and a part satisfaction will not be intended; whereas, in cases where the thing done can be considered as a *part performance* of the thing contracted for, it shall be so taken.[1]

§ 587. **Presumption of Performance by Trustees.**— There is another and quite different case, which has sometimes been regarded by writers and judges as an instance of performance, but which properly belongs to trusts arising by operation of law. I shall therefore briefly mention it in this connection; its full discussion will be found in the subsequent chapter upon Trusts. Whenever a trustee or other person standing in fiduciary relations, acting apparently within the scope of his powers, has trust funds in his hands, which he ought, in pursuance of his fiduciary duty, to employ in the purchase of property for the purposes of the trust, and he *does* purchase property with such funds, but takes the title thereto in his own name, without any declaration of trust, then a trust with respect to such property at once arises in favor of the original *cestui que trust* or other beneficiary. Equity imputes an intention to fulfill the obligation resting upon the trustee; and, independently of any element of fraud, it regards the trustee as *intending to perform* the obligation, as intending to act in accordance with his fiduciary duty, and not in violation thereof. It therefore treats the purchase as made for the benefit of the person beneficially interested. This doctrine is one of wide operation, of great efficiency, and is applied to every variety of persons occupying fiduciary relations.[2]

[1] Note of Mr. Cox to Blandy v. Widmore, 1 P. Wms. 324; and see remarks in Goldsmid v. Goldsmid, 1 Sw. 211, 220, 221; also *ante*, section on Satisfaction.

[2] See *ante*, vol. 1, § 422.

Trustees.—Trench v. Harrison, 17 Sim. 111; Lench v. Lench, 10 Ves. 511; Mathias v. Mathias, 3 Sm. & Gif. 552; Ouseley v. Anstruther, 10 Beav. 461; Deg v. Deg, 2 P. Wms. 412, 414; Perry v. Phelips, 4 Ves. 108; 17 Id. 173; Schlaefer v. Corson, 52 Barb. 510; Ferris v. Van Vechten, 73 N. Y. 113; McLarren v. Brewer, 51 Me. 402.

Executors and Administrators.—White v. Drew, 42 Mo. 561; Stow v. Kimball, 28 Ill. 93; Barker v. Barker, 14 Wisc. 131.

Directors of Corporations.—Church v. Sterling, 16 Conn. 388.

Guardians.—Johnson v. Dougherty, 3 C. E. Green, 406; Bancroft v. Consen, 13 Allen, 50.

§ 588. **Meritorious or Imperfect Consideration.**—Closely akin to the equity of performance, and properly a special instance of it, is that of meritorious or imperfect consideration. Indeed, all cases of satisfaction and of performance have been treated by some writers as applications of this equity.[1] All agreements, so far as the binding efficacy of their promises is concerned, must be referred to one or the other of three *causes*—a valuable consideration, a mere voluntary bounty, or the performance of a moral duty. The first alone is binding at law, and enables the promisee to enforce the obligation against the promisor. The second, while the promise is executory, is a mere nullity both at law and in equity. The third constitutes the meritorious or imperfect consideration of equity, and is recognized as effective by it within very narrow limits, although not at all by the law. While this species of consideration does not render an agreement enforceable against the promisor himself, nor against any one in whose favor he has altered his original intention, yet if an intended gift based upon such meritorious consideration has been partially and *imperfectly* executed or carried into effect by the donor, and if his original intention remains unaltered at his death, then equity will, within certain narrow limits, enforce the promise thus imperfectly performed, as against a third person claiming merely by operation of law, who has no equally meritorious foundation for his claim. The equity thus described as based upon a meritorious consideration only extends to cases involving the duties either of charity, of paying creditors, or of maintaining a wife and children. This last duty of maintaining children includes persons to whom the promisor stands *in loco parentis*.[2] The specific cases involving these three kinds of duties to which the doctrine has been applied by courts of equity are the supplying surrenders of copyholds against the heir,[3] and the supporting and completing defective executions of powers, where the defect is formal, against the one who would be entitled in remainder. Since the first of these cases does not exist under our law, it is only necessary to consider the second.

§ 589. **Defective Execution of Powers.**—Where the de-

Committees of Lunatics.—Reid v. Fitch, 11 Barb. 399.

Agents.—Bridenbecker v. Lowell, 32 Barb. 10; Robb's Appeal, 41 Pa. St. 45.

Partners.—Smith v. Burnham, 3 Sumn. 435; Oliver v. Piatt, 3 How. (U. S.) 333, 401; Homer v. Homer, 107 Mass. 82; Settembre v. Putnam, 30 Cal. 490; Jenkins v. Frink, 30 Id. 586.

[1] See Adams' Eq., p. 97–106 [230–244].

[2] See *ante*, vol. 1, § 556, and cases cited in notes.

[3] Rodgers v. Marshall, 17 Ves. 294.

fect in the execution is merely formal, equity will support, correct, and complete the defective execution of powers, as against a remainder-man who has no equally meritorious claim, on behalf of the classes of persons in whose favor the "meritorious consideration" exists—that is, on behalf of charities, purchasers, creditors, children, or wives. The *rationale* of this doctrine is the following: Although in the absence of a valuable consideration there is no complete obligation resting upon the promisor, yet from the presence of the meritorous consideration, there is, in contemplation of equity, as between the meritorious beneficiary and the remainder-man possessing no equally meritorious claim, a *quasi* obligation, a duty binding between the parties thus situated. An attempt having been made to execute the power, which is only *formally* defective, equity imputes to the donee in making the attempt an intent to fulfill this *quasi* obligation. An intent to perform having been thus shown and partly accomplished, a court of equity carries it into effect by decreeing a complete performance. The case is thus brought, in appearance at least, within the general principle concerning performance, and the equitable maxim which underlies that principle. The *rationale* thus described may be exceedingly artificial; it may be in reality unsound and inconsistent with other established principles; but notwithstanding these objections, the doctrine itself is firmly settled upon the basis of authority.[1]

§ 590. **Requisites; a Partial Execution Necessary.**—The powers which the doctrine may thus enforce are those given in wills, family settlements, and other similar instruments, and not bare authorities conferred by law. In the first place, there must be an execution of the power by the donee thereof formally defective, or a contract amounting to such a defective execution; otherwise the doctrine does not apply. If there has been no execution at all, the court can not interfere; for the donee, having an option by the very terms of the power, has shown an intention not to execute. If the defect is substantial and not formal, the court can not relieve, for its interposition would then frustrate the intention of the donor, that the power, if executed at all, should be executed in a prescribed manner, or by specified means.[2] In the second place, the

[1] Holmes v. Goghill, 7 Ves. 499; 12 Id. 206; Reid v. Shergold, 10 Id. 370; Tollett v. Tollett, 2 P. Wms. 489; Bradish v. Gibbs, 3 Johns. Ch. 523; Schenck v. Ellingwood, 3 Edw. Ch. 175; Dennison v. Goehring, 7 Pa. St. 175; Porter v. Turner, 3 Serg. & R. 108; Innes v. Sayer, 3 Macn. & G. 606; 7 Hare, 377 (in favor of a charity); Long v. Hewitt, 44 Iowa, 363.

[2] Tollett v. Tollett, 2 P. Wms. 489;

original intention of the donee in making the defective execution must continue unaltered. The fact that the defective appointment is left untouched is rather evidence that the donee's intention continued unchanged, than of a contrary intent. If, however, any subsequent act of his shows a change of his original intent, then the right to the interposition of a court of equity, for the purpose of completing the execution, is gone; since the court interferes only to carry out his intention, and never to relieve in opposition to that intention.[1] Finally, the party against whom the completed execution is sought, must not have an equally meritorious claim. If, therefore, the heir at law or remainder-man, to whom the estate would pass in case the attempted appointment under the power should fail, is a child or even a grandchild wholly unprovided for, the relief, it seems, will not be granted. It is not enough to defeat the equitable right to an enforcement that the heir is disinherited by his own immediate ancestor, for if he has been provided for by some one else, his claim is not equally meritorious, and it makes no difference from whom the provision came. The relative amount of the provisions, if any, made for different children in such cases is immaterial, for the parent himself is the judge of the amount proper for each child.[2]

SECTION V.

CONCERNING NOTICE.

ANALYSIS.

§ 591. Questions stated. Le Neve v. Le Neve.
§ 592. Knowledge and notice distinguished.
§ 593. Kinds; actual and constructive.
§ 594. Definition.
§§ 595–603. Actual notice.
§ 596. When shown by indirect evidence.
§ 597. What constitutes; rumors; putting on inquiry, etc.
§§ 598–602. Special rules concerning actual notice.
§ 603. Effect of knowledge instead of notice.
§§ 604–609. Constructive notice in general.
§ 605. Jones v. Smith, opinion of V. C. Wigram.

Reid v. Shergold, 10 Ves. 370; Lippencott v. Stokes, 2 Halst. Ch. 122; Drusadow v. Wilde, 63 Pa. St. 170; Bingham's Appeal, 64 Id. 345. As to statutory powers see Smith v. Bowes, 38 Md. 463.

[1] Finch v. Finch, 15 Ves. 43, 51; Antrobus v. Smith, 12 Id. 39.

[2] Rodgers v. Marshall, 17 Ves. 294; Hills v. Downton, 5 Id. 557; Morse v. Martin, 34 Beav. 500; Porter v. Turner, 3 Serg. & R. 108.

§§ 606, 607. When the presumption is rebuttable; due inquiry.
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§ 609. Species of constructive notice.
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§§ 616–618. Extent and effect of the notice.
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§ 632. *Rationale:* Bellamy v. Sabine.
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§§ 641–643. 5. By judgments.
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§§ 645, 646. (1) The statutory system; abstract of statutes.
§§ 647–649. (2) General theory, scope, and object of the legislation.
§§ 650–654. (3) Requisites of the record in order that it may be a notice.
§ 655. (4) Of what the record is a notice.
§§ 656–658. (5) To whom the record is a notice.
§ 657. Not to prior parties.
§ 658. To subsequent parties holding under the same source of title; effect of a break in the record.
§§ 659, 660. (6) Effect of other kinds of notice in the absence of a record.
§§ 661–665. (7) What kinds of notice will produce this effect.
§ 662. English rule.
§§ 663, 664. Conflicting American rules; actual or constructive notice.
§ 665. True *rationale* of notice in place of a record.
§§ 666–676. 7. Notice between principal and agent.
§§ 666–669. Scope and applications.
§§ 670–675. Requisites of the notice.
§ 670. (1) Notice must be received by agent during his actual employment.
§§ 671, 672. (2) And in the same transaction; when in a prior transaction.
§ 673. (3) Information must be material; presumption that it was communicated to the principal.
§§ 674, 675. Exceptions: agent's own fraud.
§ 676. True *rationale* of this rule.

§ 591. **Questions Stated.**—It has been shown in the preceding chapter that there are two fundamental *principles* or maxims affecting to a greater or less degree nearly the entire body of equity jurisprudence—nearly the entire administration

of equitable rights and remedies, namely, Where there are equal equities, the one which is prior in time must prevail, and where there are equal equities the law must prevail. These two principles necessarily find their most important application in cases, which are constantly arising, where several different, and perhaps successive, equitable or legal and equitable interests in or claims upon the same subject-matter exist at the same time, and there is a contest for the precedence among the respective holders of these interests or claims. It has also been shown that the application of these maxims turns upon the question, when are the different equities simultaneously subsisting with respect to the same subject-matter "equal," or, on the other hand, what renders them "unequal," so that one shall have an essential inherent superiority over another? In answering this question the doctrine of Notice plays a most important part. When a person is acquiring rights with respect to any subject-matter, the fact whether he is so acting with or without notice of the interests or claims of others in or upon the same subject-matter, is regarded throughout the whole range of equity jurisprudence as a most material circumstance in determining the extent and even the existence of the rights which he actually acquires. In conformity with this view the general rule has been most clearly established, that a purchaser with notice of the right of another, is in equity liable to the same extent and in the same manner as the person from whom he made the purchase. The same rule may be thus expressed in somewhat different language; a person who acquires a legal title or an equitable title or interest in a given subject-matter, even for a valuable consideration, but with notice that the subject-matter is already affected by an equity or equitable claim in favor of another, takes it subject to that equity or equitable claim. On the other hand, a person who has acquired a title, and paid a valuable consideration, without any notice of an equity actually existing in favor of another, *may* by that means obtain a perfect title and hold the property freed from the prior outstanding equity. This general doctrine was formulated by Lord Hardwicke in a celebrated case in the following emphatic terms: "The ground of it is plainly this: That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser. This is a species of fraud and *dolus malus* itself: for he knew the first purchaser had the clear right of the estate, and after knowing that he takes away the right of another person by getting the legal estate. Now, if a

person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum*. It is a maxim, too, in our law that *fraus et dolus nemini patrocinari debent.*"[1] Lord Hardwicke was here speaking of the effect of an actual notice; and undoubtedly it is an act savoring of fraud for a person who has received actual, direct notice of another's right, to go on and knowingly acquire the property in violation of that other's right. But on the other hand, to base the entire doctrine of notice upon fraud, to regard all its rules as inferences from the equitable principle against fraud, is, in my opinion, to ignore the plain meaning of words, and to introduce an unnecessary and misleading fiction into the subject. Most of the confusion in the discussion by courts and writers has resulted, as it seems to me, from their acceptance of this dictum of Lord Hardwicke as universally true, and from their attempt to treat the effects of notice, under all circumstances, as mere instances and results of fraud. The great importance of the subject having thus been exhibited, its further examination will be conducted in the following order: *First.* The nature of notice, what constitutes it, and its various kinds and classes; *Second.* The effects of notice, and especially the consequences of notice or the want of notice in determining priorities among equitable claims to or upon the same subject-matter.

§ 592. **Knowledge and Notice Distinguished.**—Before entering upon this examination a few preliminary observations are necessary to clear the ground, and to explain the exact nature of the questions which are to be discussed, and of the conclusions to be reached by such discussion. In the first place, it is of the utmost importance to distinguish between the objects and purposes for which the fact of notice having been given may be invoked. One object of notice may be simply to affect the priority of a right which the one receiving it has acquired, and to subordinate such right to an interest in the same subject-matter held by another. On the other hand, notice *may* be regarded as an ingredient or badge of fraud, as a feature which renders the transaction entered into by the person who receives it fraudulent. A distinction clearly exists between these two purposes; and the rules which govern the nature and effect of notice in each must be different. That might easily be sufficient to subordinate a person's right to another interest, which would at the same time fall far short of stamping his conduct with

[1] Le Neve v. Le Neve, Amb. 436; 2 Eq. Lead. Cas. 109 (4th Am. ed.)

actual fraud. In the second place, it should be most carefully borne in mind that the legal conception of "notice," as contained in the settled doctrines and rules of equity, is somewhat artificial and even technical. In this purely legal artificial sense, notice is by no means synonymous with knowledge; *although the effects produced by it are undoubtedly the same which would result from actual knowledge.* In other words, while the doctrines of equity on the subject do not assume that notice *is* knowledge, nor even that it is necessarily followed by knowledge, they still often impute to it the very same consequences which would flow from actual knowledge acquired by the party. As the notice spoken of by the rules is not knowledge, there may be notice without knowledge, and knowledge without notice. If a person A. were negotiating with B. for the purchase of a piece of land, and should be informed either by B. or by C. that B. had already given a deed or mortgage of the same land to C., such information would be notice, and even the highest kind of notice; but A. would not thereby, in any true meaning of the word, have *knowledge* of the deed or mortgage, of its various provisions and legal effect. On the other hand, if before the negotiation A. had been casually shown the deed or mortgage itself by some third person in whose possession it happened to be, had been permitted by such person to take and read the instrument, had carefully examined it, and had thus become familiar with all of its provisions and its legal effect, he would not, within the settled meaning of the legal term, have received *notice*, but he would most certainly have obtained, and would be acting with, a complete *knowledge* of the instrument. Again, under certain circumstances, if A., while dealing with respect to a piece of property, deliberately and intentionally refrains from making inquiries concerning outstanding incumbrances or claims, for the very purpose of avoiding any information, he is charged with notice of the incumbrances and claims which are actually outstanding; but he certainly does not acquire, and can not possibly have, a *knowledge* of such prior charges or interests. The record of a deed or mortgage, when regularly and properly made, is constructive notice to subsequent purchasers and incumbrancers; but it does not necessarily convey any knowledge to such persons; while A. in purchasing land from B. is absolutely and conclusively bound by the proper record of a prior instrument affecting the same premises, he may be acting in perfect good faith and in most complete ignorance of the actual existence of any such instrument. If, however, before making

the purchase, A. had examined the official records, and had there discovered and read a deed or mortgage of the same land copied at length in the book of records, but under such circumstances that it was not legally entitled to be recorded, on account of a defective acknowledgment or other irregularity, he would not thereby have received any legal *notice* within the true meaning of the term, but he would as certainly have obtained a full *knowledge* of the instrument. These instances are sufficient to illustrate the distinction between notice, in its legal and somewhat artificial conception, and knowledge; and to show that one may exist without the other. Unless this distinction is clearly apprehended, and constantly borne in mind, much of the judicial discussion concerning the nature and effect of notice will seem to be confused and uncertain, and an irreconcilable conflict will appear among many of the decisions; the distinction renders the discussion clear and certain, and the decisions harmonious. Whenever the mere notice, in its strict signification, is relied upon, even though not accompanied or followed by any actual knowledge, then, from considerations of policy and expediency, the same effects are attributed to it which would have resulted from actual knowledge; and it will be found that what constitutes this notice is determined by definite, precise, and even somewhat technical rules. Whenever, on the other hand, a party is shown to have obtained an actual knowledge, even though there has been nothing which constitutes a notice in its true sense, then there is no longer any necessity of resorting to the artificial conception of notice; the consequences must naturally and necessarily flow from an actual knowledge of facts by a party, which from motives of expediency are attributed to a *notice* of the same facts given to him, in the absence of actual knowledge. In a word, among the complicated affairs and transactions of life, it is often necessary that mere "notice" should take the place of actual knowledge; but this does not and can not mean that actual knowledge shall not produce the same effects upon the rights of parties, which, from motives of policy, are given to its representative and substitute notice. This conclusion is, as it seems to me, self-evident, and it is most important; it reconciles at once all the confusion and conflict of opinion, which, it must be confessed, appear in some of the decisions; and it has the support of the ablest judicial authority. It has been expressly sanctioned and adopted as the settled principle upon which courts of equity act, in a recent case by one of the ablest of modern

English equity judges, Lord Cairns. He is speaking of a trustee dealing with the trust fund in his hands, and acting with *knowledge*, but without the true notice, actual or constructive, required by the settled rules, of an incumbrance on the property created by the *cestui que trust*. The general language which he uses with respect to these particular facts, will apply to all cases of knowledge as distinct from notice. Lord Cairns says: "All I can do is to apply those principles which have been well established as part of those principles on which the court proceeds. * * * * * I am bound to say that I do not think it would be consistent with the principles upon which this court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee, without express notice from the incumbrancer, be fixed with knowledge of an incumbrance upon the fund of which he is the trustee. It must depend upon the facts of the case. But I am quite prepared to say that I think the court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any *proof of what would only be constructive notice*, but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shown that *in any way* the trustee has got *knowledge* of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—there I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created."[1] This extract states what is, in my opinion, the general doctrine, applied here to a trustee, but applicable to all persons whose rights or liabilities can be affected by notice of rights belonging to others. It declares that although there may be no technical "notice," not even a *constructive* notice, still there may be an *actual knowledge*, acquired in modes which do not amount to notice; and this *knowledge* may produce the same effects which the rules of equity attribute to "notice."

[1] Lloyd v. Banks, L. R., 3 Ch. 488, 490, per Lord Cairns.

§ 593. **Kinds: Actual and Constructive.**—Notice has been divided by judges and writers into the two main classes, "Actual," and "Constructive;" but there is a great diversity of opinion among text-writers in determining what particular kinds shall come within each of these two classes. According to some, "constructive" notice includes those instances in which no information of the existence of any prior right or claim is directly or indirectly communicated to the party; but certain facts are shown to have existed, and from these the party is *conclusively* presumed to have received the information, and is therefore conclusively charged with notice. In other words, the information amounting to a notice, although not in fact given, is inferred as a conclusive presumption of the law, and this presumption can not be rebutted by any evidence to the contrary. All other kinds, according to this theory, are "actual." This latter class, therefore, embraces many degrees, from the highest, where a positive, personal information of a fact is directly communicated to the party, down through every grade, in which the notice is either implied by *prima facie* presumptions of law from certain facts shown to exist, or is inferred as an argumentative conclusion, with greater or less cogency, from evidence which is perhaps entirely circumstantial. The objections to this mode of classification are plain. It is, in fact, no classification; it groups under the head of "actual" notice different species which have no common features, no real resemblance, and the name "actual" is an evident misnomer; while on the other hand the class of "constructive" is, from its definition, necessarily confined to a very few species, technical and artificial in their nature, the most important one being wholly the creature of statute. I prefer and shall adopt the classification approved and followed by many of the most eminent judges, which has the merit of simplicity, naturalness, and certainty. According to this arrangement, "actual" notice embraces all those instances in which positive personal information of a matter is directly communicated to the party, and this communication of information being a fact, is established by evidence *directly* tending with more or less cogency to its proof. "Constructive" notice includes all other instances, in which the information thus directly communicated can not be shown, but the information is either *conclusively* presumed to have been given and received from the existence of certain facts, or is implied by a *prima facie* presumption of the law in the absence of contrary proof.

§ 594. **Definition.**—Judges and text-writers have seldom attempted to define notice in the abstract, but have generally contented themselves with specifying instances, or describing its kinds and effects. Within the meaning of the rules, notice may, I think, be correctly defined as the *information concerning a fact*, actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent *in its legal effects* to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge. It should be most carefully observed that the notice thus defined is not knowledge, nor does it assume that knowledge necessarily results. On the other hand, the information which constitutes the notice may be so full and minute as to produce complete knowledge.[1] Although an actual knowledge is not necessarily assumed to result, yet in many instances, as will be seen, the party is not permitted to show this fact, but the same consequences follow with respect to his rights and interests as though he had obtained real knowledge. The correctness of the definition which I have formulated, will appear from a comparison of all the cases hereafter cited in the discussions of this section. In dealing with the subject, great care should be taken to distinguish between notice and the evidence by which it is established. The personal communication of information which constitutes notice, is a fact which may be proved by any kind of competent evidence submitted to, weighed, and passed upon by the tribunal which decides matters of fact. Whenever the notice is inferred by a conclusive or *prima facie* presumption from certain facts, the office of evidence is to prove the existence of those facts.

[1] Of the few definitions given by text-writers, the following are examples: The English editors of the Leading cases in equity attempt no general definition. The American editor says: "In legal parlance notice is information given by one duly authorized, or derived from some authentic source. Notice may be either actual or constructive." While this definition has the merit of extreme brevity, and of correctly preserving the distinction between notice and knowledge, it lacks, as it seems to me, some of the essential elements of the entire legal conception. (2 Eq. Lead. Cas., p. 144, 4th Am. ed.) Another American writer says: "Notice, then, in its technical sense, is the legal cognizance of a fact. It differs from knowledge, for knowledge may exist without notice, and there may be notice without any actual knowledge. * * * * Notice, therefore, in the sense here used, may be said to be the definite legal cognizance, either actual or presumptive, of a right or title." (Bipsham, p. 325.) While the distinction between notice and knowledge is here distinctly emphasized, yet the definition itself, in calling notice the "legal cognizance" of a fact, gives the *effect* of notice rather than describes the thing itself. Legal cognizance means simply legal knowledge, and is the effect which the law regards as produced by notice.

Notice is either actual or constructive; but the legal effect of each kind, when established, is exactly the same.[1]

§ 595. **Actual Notice.**—Actual notice is information concerning the fact—as for example, concerning the prior interest, claim, or right—directly and personally communicated to the party.[2] The distinction between actual and constructive notice does not primarily depend upon the *amount* of the information, but on the manner in which it is obtained or assumed to have been obtained. In actual notice information is not *inferred* by any presumption of law; the personal communication of it is a fact, and like any other fact is to be proved by evidence. The information *may* be so full, minute, and circumstantial, that the party receiving it thereby acquires a complete knowledge of the prior fact affecting the transaction in which he is then engaged; or it may fall far short of conveying such knowledge.[3] Again the evidence may be so direct, positive, and overwhelming as to establish the fact that the information was personally given and received, in the most convincing and unequivocal manner; or it may be entirely indirect and circumstantial. Wherever, from competent evidence, either direct or circumstantial, the court or the jury is entitled to infer *as a conclusion of fact, and not by means of any legal presumptions*, that the information was personally communicated to or received by the party, the notice is actual. In short, actual notice is a conclusion of fact, capable of being established by all grades of legitimate evidence.[4]

§ 596. **When Shown by Indirect Evidence.**—It is admitted by all text-writers and by many judges, that much confusion and inaccuracy of language are exhibited in the decisions concerning actual and constructive notice; notices are not in-

[1] Prosser v. Rice, 28 Beav. 68, 74.

[2] "Notice is actual when the purchaser is aware of the adverse claim or title, or has such information as would lead to knowledge." Am. note in 2 Eq. Lead. Cas., p. 144 (4th Am. ed.)

[3] Williamson v. Brown, 15 N. Y. 354. Actual notice need not be full circumstantial information of every material fact affecting the right of the person receiving it; it is enough that it be information directly tending to show the existence of the fact, and sufficient to put the party on an inquiry. Barnes v. McClinton, 3 Penn. 67; Tillinghast v. Champlin, 4 R. I. 173, 215.

[4] Tillinghast v. Champlin, 4 R. I. 173, 215; Warren v. Swett, 31 N. H. 332, 341, 342; Hull v. Noble, 40 Me. 459, 480; Buttrick v. Holden, 13 Met. 355, 357; Trefts v. King, 6 Harris (18 Pa. St.) 157, 160; Rogers v. Jones, 8 N. H. 264; Griffith v. Griffith, 1 Hoff. Ch. 153; Nelson v. Sims, 1 Cushman, 383, 388; Curtis v. Blair, 4 Id. 309, 328; Bartlett v. Glascock, 4 Mo. 62, 66; Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7 Id. 261, 274; Blatchley v. Osborn, 33 Conn. 226, 233; Buck v. Paine, 50 Miss. 648, 655; Carter v. City of Portland, 4 Oreg. 339, 350, per McArthur, J., a very clear and accurate statement of the doctrine; Speck v. Riggin, 40 Mo. 405; Maupin v. Emmons, 47 Id. 304, 306, 307; Maul v. Rider, 59 Pa. St. (9 P. F. Smith), 167, 171, 172.

frequently called "constructive," which are really "actual;" and the rules governing the two are confounded.[1] That the party has knowledge or information of facts sufficient to put him upon an inquiry, has often been treated as peculiarly the characteristic of constructive notice. In truth, however, this test is equally applicable to every instance of actual notice inferred by process of rational deduction from circumstantial evidence.[2] The distinction is plain and natural. In all cases

[1] Williamson v. Brown, 15 N. Y. 354, per S. L. Selden, J.

[2] The confusion mentioned in the text is easily and completely dispelled, and the necessary distinction between the two kinds of notice is clearly shown by a brief analysis of their essential operation. When A. is dealing with B. for the purchase of land which he knows, sees, or is told to be in the possession of a stranger C., such possession does not show or tend to show that any information or knowledge of C.'s interest was directly and personally communicated to A.; but *the law presumes* that information of C.'s real interest and claim was communicated. But the presumption in this case is rebuttable; it is said that A. is put upon an inquiry; if he fails to make *any* inquiry, or to prosecute it with reasonable diligence, then the presumption is absolute; if he does prosecute it with reasonable diligence, and does not discover the truth, then the presumption is overcome. But it should be observed, that the jury or court does not find the existence of a notice as a conclusion of fact deduced by rational argument from the fact of C.'s possession; the only province of the triers of fact in this case is to determine the nature, extent, and effect of A.'s inquiry as a means of rebutting the presumption. A second kind of constructive notice arises from recitals, statements, and references in title-deeds. Here, also, it is very plain that there is nothing tending to show direct personal information, since the party is affected with the notice although he may not have read the deed, and even though he may not have seen it. A. is the grantee in a deed of conveyance. From the mere fact that he must derive his title through that instrument and through the line of prior conveyances, he is charged with notice of all that they contain or refer to. This fact does not in the least tend to show that A. received any direct personal information of a conflicting interest or claim; the inference is a pure presumption of law, based upon considerations of general policy, and does not require any argumentative deduction from evidence. A third instance of constructive notice is that with which a principal is charged, when information or knowledge has been obtained by his agent. When this particular case is carefully considered it will be perceived that it is governed by precisely the same principles as those which have already been examined. The *mere fact* that the agent has acquired information, does not tend to show that the information has been directly and personally communicated to the principal; nor does the rule depend in the slightest degree upon such an assumption. That information constituting notice is imputed to the principal, is entirely a presumption of law, supported by considerations of expediency, and made without any reference to the actual fact. The last instance of constructive notice which I shall mention is that resulting from registration pursuant to statute. The *mere fact* that an instrument, of which the party is profoundly ignorant, has been recorded, certainly does not tend to show that he has received any direct personal information concerning it, and the interest or claim which it creates. The presumption arises from the positive mandate of a statute; there is no occasion for, nor even possibility of, any conclusion of fact drawn from evidence by a process of argument.

The foregoing instances show the *rationale* of the operation of all constructive notices. A similar analysis will disclose the true operation of actual notice. When A. is dealing with B. for the purchase of land, and the evidence shows that A. is directly and personally informed, either by B. or by C., that C. already holds a conveyance, or mortgage, or incumbrance,

of constructive notice, there is no evidence which directly tends to show that any information of the prior conflicting claim was personally brought home to the consciousness of the party affected; the particular facts of which he is shown to have knowledge do not directly tend to show such information; but from these facts the legal presumption arises, either conclusive or rebuttable, that the information was received. In all cases of actual notice inferred from circumstantial evidence, the facts proved do directly tend to show that information of the prior conflicting claim was personally brought home to the consciousness of the party. The court or jury infers from the

or possesses an easement or other charge upon the same premises; the case is so simple, and the notice is so clearly actual, that no doubt can exist concerning it. Whenever the object is to prove that A. has received the same kind of personal information concerning some prior interest or claim held by C., but the fact can not be shown by any direct evidence, *but must be established by indirect and circumstantial evidence*, that is, must be inferred by the jury or court as a legitimate deduction from such evidence—the notice is none the less actual; it is to be inferred as a conclusion of fact, by a weighing of the evidence and process of argument *unaided by any legal presumptions*. One illustration will suffice. A. purchased land from B. A third person C., from whom B. obtained the property, has a claim upon it; and the question is whether A. took with notice of C.'s claim. There is no direct evidence of any information given to A. by either B. or C. But it is proved that A. is B.'s son, and has constantly lived in his house and been a member of his family; that for several years A. has been acquainted with his father's business affairs, and has taken an active part in their management; that A. was familiar with the transaction by which B. obtained the premises from C., and aided his father in negotiating the contract with C., etc. If from these and similar facts a notice should be inferred, it would be an actual notice and not constructive. No legal presumptions would aid the court or jury; they would simply arrive at the conclusion, by a process of rational argument, that at some time information or knowledge of C.'s claim was directly and personally communicated to or acquired by A., in exactly the same manner as a jury may infer that a certain man and woman were at some past time actually married from the circumstantial evidence of their cohabitation and holding each other out to the world as husband and wife. The only question of law in such a case is, whether the evidence is sufficient to warrant the finding of fact that information or knowledge of C.'s claim was actually acquired by A. It is true that many cases say, under such circumstances, that "the facts proved are sufficient to put the party A. upon an inquiry, and if he neglected to make a due inquiry he must be charged with notice." Such a mode of statement is entirely proper; but it is incorrect, misleading, and a confounding of the two kinds of notice, to say under such circumstances that if the party neglects to make a due inquiry *he is presumed to have received the information* which constitutes notice. In all cases of information constituting actual notice inferred from circumstantial evidence, this statement that "the facts proved are sufficient to put the party upon an inquiry," etc., is simply tantamount to saying that the facts and circumstances, when uncontradicted and unexplained, are sufficient evidence to warrant a finding that the information was directly and personally acquired by the party; but that the facts and circumstances may be sufficiently explained by the party's showing that he did make a reasonable inquiry and did seek for information, but failed to obtain it. By such means the conclusion which would otherwise have been drawn from the unexplained circumstances is overcome and negatived. For illustrations of these positions, see cases cited in the next following note.

facts proved, by a process of rational deduction, *but without the aid of any legal presumption*, that such information was actually received. In weighing this evidence, the tribunal may properly ask whether the facts proved were sufficient to put the party upon an inquiry, so that, if he went on with the transaction without making any inquiry, his actual receipt of information and consequent notice is a legitimate or necessary conclusion; or whether, on the other hand, he prosecuted an inquiry to such an extent and in such a manner, that his actual failure to acquire information is a just inference of fact.[1] A careful exam-

[1] In a large number of American cases the discussion concerning actual notice has arisen upon an interpretation of a statutory provision which expressly requires "actual notice" of a prior unrecorded deed or incumbrance, in order that it may have priority over a subsequent deed or mortgage which is first put on record. In a few of the states the courts have interpreted the intention of the legislature as demanding that the personal information of the unrecorded instrument should be proved by direct evidence, and as excluding all instances of actual notice established by circumstantial evidence. In most of the states, however, where this statutory clause is found, the courts have defined the "actual notice" required by the legislature as embracing all instances of that species in contradistinction from "constructive notice" —that is, all kinds of actual notice, whether proved by direct evidence or inferred as a legitimate conclusion from circumstances. Whichever view of the statute be taken, these decisions are all useful in describing the nature of actual notice, and especially in distinguishing actual notice proved by circumstantial evidence from constructive notice. See Brinkman v. Jones, 44 Wisc. 498, 517, 519, 521, 523; Brown v. Volkening, 64 N. Y. 76, 82, 83; Lambert v. Newman, 56 Ala. 623, 625; Helms v. Chadbourne, 45 Wisc. 60, 70, per Cole, J.; Chicago etc. R. R. v. Kennedy, 70 Ill. 350, 361, per Walker, J.; Shepardson v. Stevens, 71 Ill. 646; Erickson v. Rafferty, 79 Ill. 209, 212; Reynolds v. Ruckman, 35 Mich. 80; Loughridge v. Bowland, 52 Miss. 546, 553, 555; Trefts v. King, 6 Harris (18 Pa. St.) 157, 160; Rogers v. Jones, 8 N. H. 264; Griffith v. Griffith, 1 Hoff. Ch. 153; Nelson v. Sims, 1 Cushm. (Miss.) 383, 388; Barnes v. McClinton, 3 Penn. 67; Bartlett v. Glascock, 4 Mo. 62, 66; Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, Id. 261, 274; Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Blair, 4 Cushm. (Miss.) 309, 328; Hull v. Noble, 40 Me. 459, 480; Warren v. Swett, 31 N. H. 332, 341; Tillinghast v. Champlin, 4 R. I. 173, 215; Buck v. Paine, 50 Miss. 648, 655; Carter v. City of Portland, 4 Oreg. 339, 350; Pringle v. Dunn, 37 Wisc. 449, 460, 461, 465; Parker v. Kane, 4 Id. 1; Shotwell v. Harrison, 30 Mich. 179; Munroe v. Eastman, 31 Id. 283; Eck v. Hatcher, 58 Mo. 235; Maupin v. Emmons, 47 Id. 304, 306, 307; Parker v. Foy, 43 Miss. 260, 266; Wailes v. Cooper, 24 Id. 208, 228.

In the recent and very instructive case of Brinkman v. Jones, *supra*, the question was, whether a grantee had sufficient notice of a prior unrecorded deed to defeat his own recorded conveyance. The court were called upon to interpret the Wisconsin statute which requires "actual notice" under such circumstances; and it discussed in a very full and accurate manner the true meaning and operation of actual notice. Taylor, J., said (p. 519): "The actual notice required by the statute is not synonymous with *actual knowledge*. We think the true rule is, that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase. When the subsequent purchaser has knowledge of such facts, it becomes his duty to make inquiry, and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received if he had made

ination of the cases concerning notice inferred from circumstances, will show that in a large proportion of them the notice was actual and not constructive; and that one or the other of the following questions was in reality considered and determined by the court: (1) It being shown that the party had been informed of certain facts, and it further appearing that he had, notwithstanding such information, and without making

the inquiry. We are aware that this construction of the statute is in conflict with the later decisions in Massachusetts and Indiana, and with the definition given to the term by Story in his Equity Jur., § 399; Parker v. Osgood, 3 Allen, 487; Dooley v. Wolcott, 4 Id. 406; Sibley v. Leffingwell, 8 Id. 584; White v. Foster, 102 Mass. 375; Lamb v. Pierce, 113 Id. 72; Crasson v. Swoveland, 22 Ind. 428, 434. * * * These cases all proceed upon the theory that actual notice and actual knowledge mean the same thing." The court also cites decisions from many other states by which the same interpretation is given to similar statutes, and the same meaning attributed to "actual notice." It is admitted, however, that no mere "constructive notice" to the subsequent purchaser would avail, under such a statute, to defeat his rights under an instrument first recorded. In the following cases substantially the same test is laid down, namely, "a knowledge of such facts and circumstances as would put an ordinarily prudent man upon an inquiry." It is true that in some of these opinions the language of the court *appears* to connect this test with constructive notice only; but a closer examination will show that, whatever be the language used, the judge really has in mind and is speaking of those instances of actual notice which are inferred from circumstantial evidence. See Lambert v. Newman; Helme v. Chadbourne; Chicago etc. R. R. v. Kennedy; Shepardson v. Stevens; Loughridge v. Bowland; Barnes v. McClinton; Warren v. Swett; Buttrick v. Holden; all of which are cited *supra*. In the recent case of Brown v. Volkening, *supra*, the kind and amount of notice required to defeat the precedence obtained by the first recording of a subsequent conveyance was discussed. The statute of New York does not in express terms require the notice to be actual. The notice relied upon was constructive, arising from the fact of possession by a third person; and the precise point decided was confined to the kind, nature, purposes, and extent of the possession necessary under such circumstances to raise a legal presumption and to constitute a sufficient constructive notice. In the course of his opinion, however, Allen, J., speaks of actual notice in the following language, which fully corroborates the positions of the text (p. 82): "Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge or notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be proof of actual notice of prior title or prior equities, or *circumstances tending to prove* such prior rights, which affect the conscience of the subsequent purchaser. Actual notice of itself impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice." This passage of Mr. Justice Allen's opinion exactly adopts the reasoning and conclusions as given in the text. It declares that when a court or jury find notice, as a conclusion of fact, from circumstances tending to show it, which should put a prudent man upon inquiry, such notice is actual as truly as though it was proved by direct evidence. It is actual and not constructive because, although inferred from circumstances, it is inferred by mere process of argument, and not by means of any legal presumptions. If the party thus put upon inquiry neglects to prosecute the inquiry, the conclusion of fact is then absolute, since the circumstances are left unexplained and the natural inference from them is left unanswered and unweakened. To the same effect as Brinkman v. Jones, *supra*, is Maupin v. Emmons, 47 Mo. 304, 306, 307.

any inquiry respecting its truth, gone on and completed the transaction, whether the court or jury were warranted in inferring as a legitimate conclusion from the evidence that he had *also* received that direct, personal information concerning the existence of a prior conflicting claim which the law calls "actual notice"? (2) It being shown that the party had been informed of certain facts, and it further appearing that he had thereupon made inquiry respecting the truth of such information before he completed the transaction, whether the court or jury were warranted in inferring as a legitimate conclusion from the whole evidence, either that he had or had not received that direct personal information which constitutes actual notice?[1]

§ 597. **What Constitutes it: Rumors: Putting on Inquiry, etc.**—A purchaser, or person obtaining any right in specific property, is not affected by vague rumors, hearsay statements, and the like, concerning prior and conflicting claims upon the same property; and the reason is, that such kind of reports and statements do not furnish him with any positive information, any tangible clue, by the aid of which he may commence and successfully prosecute an inquiry, and thus discover the real truth; his conscience is, therefore, not bound.[2] On the other hand, the proposition is established by an absolute unanimity of authority, and is equally true both in its application to constructive notice, and to actual notice not proved by direct evidence but inferred from circumstances, that if the party obtains knowledge or information of facts tending to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put a reasonably prudent man upon inquiry, then it may be a legitimate, and perhaps even necessary, inference that he acquired the further information which constitutes actual notice. This inference is not, in case of actual notice, a presumption, much less a conclusive presumption of law; it may be defeated by proper evidence. If the party shows that he made the inquiry, and prosecuted it with reasonable diligence, but still failed to discover the conflicting claim, he thereby overcomes and destroys the inference. If, however, it appears that the party obtains knowledge or information of such facts, which are sufficient to put a prudent man upon inquiry, and which are of such a na-

[1] See the cases cited in the last preceding, and in the next following notes.

[2] Woodworth v. Paige, 5 Ohio St. 70; Lamont v. Stimson, 5 Wisc. 443; Shepard v. Shepard, 36 Mich. 173; Doyle v. Teas, 4 Scam. 202; Butler v. Stevens, 26 Me. 484; Jaques v. Weeks, 7 Watts, 261, 267; Wilson v. McCullough, 11 Harris, 440; Jolland v. Stainbridge, 3 Ves. 478.

ture that the inquiry, *if prosecuted with reasonable diligence, would certainly lead to a discovery of the conflicting claim*, then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry, that he made the inquiry and arrived at the truth. Finally, if it appears that the party has knowledge or information of such facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun it fails to prosecute it in a reasonable manner, then also the inference of actual notice is necessary and absolute. These three propositions substantially embrace all instances of actual notice proved by circumstantial evidence; and they are illustrated by a vast number of decisions, each depending upon its own particular circumstances.[1]

§ 598. **Special Rules.**—The general rules formulated in the foregoing paragraphs, apply to all species of actual notice. The inquiry next presents itself, whether any more particular rules have been established which determine the existence or non-existence of actual notice under special conditions of fact? Since actual notice is, by its very definition, a conclusion of fact inferred from evidence more or less convincing, it is plain

[1] Spofford v. Weston, 29 Me. 140; Warren v. Swett, 31 N. H. 332, 341; Nute v. Nute, 41 Id. 60; Blaisdell v. Stevens, 16 Vt. 179, 186; Stafford v. Ballou, 17 Id. 329; McDaniels v. Flower Brook etc. M. Co., 22 Id. 274; Stevens v. Goodenough, 26 Id. 676; Blatchley v. Osborn, 33 Conn. 226, 233; Sigourney v. Munn, 7 Id. 324; Peters v. Goodrich, 3 Id. 146; Raritan Water etc. Co. v. Veghte, 6 C. E. Green (21 N. J. Eq.), 463, 478; Hoy v. Bramhall, 4 Id. (19 N. J. Eq.), 563; Williamson v. Brown, 15 N. Y. 354, 362; Swarthout v. Curtis, 5 N. Y. 301; Pendleton v. Fay, 2 Paige, 202; Danforth v. Dart, 4 Duer, 101; Jackson v. Caldwell, 1 Cow. 622; Hawley v. Cramer, 4 Id. 717; Parrish v. Brooks, 4 Brews. 154; Kerns v. Swope, 2 Watts, 75; Jaques v. Weeks, 7 Id. 261, 274; Epley v. Witherow, Id. 163, 167; Bellas v. McCarthy, 10 Id. 13; Randall v. Silverthorne, 4 Barr. 173; Trefts v. King, 6 Harris, 157, 160; Ringgold v. Bryan, 3 Md. Ch. 488; Stockett v. Taylor, 3 Id. 537; Bunting v. Ricks, 2 Dev. & Bat Eq. 130; Gibbes v. Cobb, 7 Rich. Eq. 54; Maybin v. Kirby, 4 Id. 105; Center v. The Bank, 22 Ala. 743; McGehee v. Gindrat, 20 Id. 95; Ringgold v. Waggoner, 14 Ark. 69; Bartlett v. Glascock, 4 Mo. 62, 66; Doyle v. Teas, 4 Scam. 202; Hoxie v. Carr, 1 Sumn. 193; Hinde v. Vattier, 1 McLean, 110; 7 Peters, 252; Lambert v. Newman, 56 Ala. 623, 625; Helms v. Chadbourne, 45 Wisc. 60, 70; Brinkman v. Jones, 44 Id. 498, 519; Chicago etc. R. R. v. Kennedy, 70 Ill. 350, 361; Shepardson v. Stevens, 71 Ill. 646; Erickson v. Rafferty, 79 Id. 209, 212; Reynolds v. Ruckman, 35 Mich. 80; Loughridge v. Bowland, 52 Miss. 546, 555; Brown v. Volkening, 64 N. Y. 76, 82; Chicago v. Witt, 75 Ill. 211; Buck v. Paine, 50 Miss. 648, 655, McLeod v. First Nat. B'k, 42 Id. 99, 112; Parker v. Foy, 43 Id. 260; Carter v. City of Portland, 4 Oreg. 339, 350, per McArthur, J., a very clear and accurate statement of the doctrine: Pringle v. Dunn, 37 Wisc. 449, 465; Shotwell v. Harrison, 30 Mich. 179; Munroe v. Eastman, 31 Id. 283; Eck v. Hatcher, 58 Mo. 235; Maul v. Rider, 59 Pa. St. (9 P. F. Smith), 167, 171, 172; Lawton v. Gordon, 37 Cal. 202, 205.

that each case must, to a great extent, depend upon its own circumstances; and the results collected and arranged from the decisions must, therefore, be regarded as *illustrations* of the general doctrines heretofore described, rather than as additional and more definite rules. It is possible, however, to reach some conclusions from a comparison and classification of judicial opinions, which will afford great practical aid in applying these general rules to particular cases. The whole inquiry is reduced to the examination of two entirely distinct questions, which should not be confounded, namely: What kind of information personally communicated to a party constitutes the actual notice proved by direct evidence? What facts are sufficient to put a party upon an inquiry, so that, if not overcome by contrary proofs, they would constitute the actual notice inferred from circumstantial evidence?

§ 599. **Same: Kind and Amount of Information Necessary.**—In the first of these two inquiries, it is assumed that some information is shown by direct evidence to have been personally communicated to the party, and the sole question is, what kind or amount of such information will constitute actual notice and so bind his conscience? Whenever A. is dealing concerning certain property with B. who acts as owner, grantor, vendor, or mortgagor, as the case may be, a definite statement made to A. by a third person C. that he has or claims some conflicting interest or right, legal or equitable, in the subject-matter, is a sufficient actual notice to affect A.'s conscience. The statement need not be so full and detailed that it communicates to A. complete knowledge of the opposing interest or right; it is enough that it is so definite as to assert the existence of an interest or right as a fact.[1] Under the same circumstances, if A. is informed by the grantor or vendor B. that the subject-matter is incumbered, or is subject to an outstanding lien or equitable claim, or that he himself has not for any reason a title free and perfect, such information is actual notice; it need not state all the particulars nor impart complete knowledge of the conflicting interest, incumbrance, or right; it is enough that A. is reasonably informed, and has reasonable grounds to believe, that the conflicting right exists as a fact.[2] Of course

[1] Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7 Id. 261, 274; Barnes v. McClinton, 3 Penn. 67; Bartlett v. Glascock, 4 Mo. 62, 66; Nelson v. Sims, 1 Cush. (Miss.) 383, 388; Blatchley v. Osborn, 33 Conn. 226, 233; Reynolds v. Ruckman, 35 Mich. 80 (a case in which it was held that no notice had been given); Ponder v. Scott, 44 Ala. 241, 244, 245 (case in which no notice was held to have been given).

[2] Hudson v. Warner, 2 Har. & Gill, 415; Price v. McDonald, 1 Md. 403;

the statement by B. may be so vague and uncertain, or it may be so accompanied by additional explanatory or contradictory matter, that it does not affect the conscience of the purchaser A., and does not amount to an actual notice.[1] Wherever under the circumstances above described, information given by the grantor or vendor with whom the purchaser is dealing, or by the holder of the conflicting claim or right, would constitute an actual notice, the same information may be communicated by a relative or friend of either of these persons, and would then operate in like manner as actual notice, provided the party so represented was prevented by absence, sickness, or other disability from making the communication in his own person and on his own behalf.[2]

§ 600. **Same: What Circumstances Sufficient.**—The second question is, what facts are sufficient to put the party upon an inquiry, so that he may thereby be charged with the actual notice inferred from circumstantial evidence? Among the facts to which as evidence such force has been attributed are close relationship, personal intimacy, or business connections existing between the purchaser and the party with whom he is dealing, or between him and the holder of the adverse claim;[3]

Russell v. Petree, 10 B. Mon. 184, 186; Reynolds v. Ruckman, 35 Mich. 80 (example of no notice); Chicago v. Witt, 75 Ill. 211 (ditto no notice); Ponder v. Scott, 44 Ala. 241, 244, 245 (notice merely of an intention to execute a deed is not notice of the contents of the deed afterwards executed). Definite information of a conflicting claim communicated by a third person, neither the claimant nor the party with whom the purchaser is dealing, who speaks from his own positive knowledge, *may* amount to the knowledge which supersedes and takes the place of a mere notice. This question is fully examined in a subsequent paragraph. See Butcher v. Yocum, 61 Pa. St. (11 P. F. Smith), 168, 171; Lawton v. Gordon, 37 Cal. 202, 205, 206.

[1] Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Blair, 4 Cush. (Miss.) 309, 328; Chicago v. Witt, 75 Ill. 211; Ponder v. Scott, 44 Ala. 241, 244, 245; and see *post*, § 601, where the question is more fully examined.

[2] Butcher v. Yocum, 61 Pa. St. (11 P. F. Smith) 168, 171; Mulliken v. Graham, 72 Id. (22 P. F. Smith) 484; Ripple v. Ripple, 1 Rawle, 386. In Butcher v. Yocum, *supra*, it was said not to be *essential* that notice of an equitable interest should come from the party interested or his agent; it may come *aliunde*, provided it be of a character likely to gain credit. A person about to purchase land from a widow in whom the legal title was vested, was informed by the grandfather of her minor children that the equitable title had been in her deceased husband, and was then in his heirs. The grandfather was held a proper person to give notice, and the purchaser was bound by it as an actual notice. In Ripple v. Ripple, a notice was given by an uncle of the person interested. But *per contra* see Woods v. Farmere, 7 Watts, 382, 387, per Gibson, C. J.; Jolland v. Stainbridge, 3 Ves. 478, per Lord Loughborough.

[3] It is hardly to be supposed, however, that notice could be inferred from *mere* relationship or intimacy without *any* other circumstances. Tillinghast v. Champlin, 4 R. I. 173, 204, 215; Spurlock v. Sullivan, 36 Tex. 511; Trefts v. King, 18 Pa. St. (6 Harris) 157, 160; Phillips v. Bank of Lewistown, Id. 394, 404; Hoxie v. Carr, 1 Sumn. 173, 192; Flagg v. Mann, 2 Id. 486; Dubois v. Barker, 4 Hun, 80, 86; 6 T. & C. 349 (*mere*

great inadequacy of the price, which may arouse the purchaser's suspicion, and put him upon an inquiry as to the reasons for selling the property at less than its apparent value;[1] the sight or knowledge of visible material objects upon or connected with the subject-matter, which may reasonably suggest the existence of some easement or other similar right.[2] The irregular, defective, or improper recording of an instrument, although clearly not a constructive notice under the statute, may be sufficient to put a purchaser upon inquiry and so constitute an actual notice; and the inspection, perusal, or knowledge of a writing which purported to be a certified or official copy of the instrument thus defectively or improperly recorded, should produce the same effect, although upon this particular point there seems to be some conflict of judicial opinion. It has even been held that, under special circumstances, a jury or court might assume as an inference of fact, in the absence of any positive evidence, that a purchaser examined the public records, and thus obtained information amounting to an actual notice from a conveyance imperfectly recorded, or improperly recorded, through some defect.[3]

relationship of grantee to grantor without any other evidence, not sufficient ground from which to infer notice of a conflicting equitable claim); Reynolds v. Ruckman, 35 Mich. 80 (knowledge of a partnership existing between a grantor and another held not sufficient to charge grantee with notice).

[1] Peabody v. Fenton, 3 Barb. Ch. 451; Hoppin v. Doty, 25 Wisc. 573; Beadles v. Miller, 9 Bush. 405 (case in which inadequacy of price was held not sufficient notice of grantor's fraudulent design, so as to invalidate a conveyance as against the grantor's creditors); Eck v. Hatcher, 58 Mo. 235 (case in which inadequacy of price and other circumstances were held a sufficient notice of grantor's fraud, etc.); Hoppin v. Doty, 25 Wisc. 573, 591 (a grantee bought for one hundred dollars, land which he knew to be worth two thousand dollars, held a notice of the grantor's defects of title, fraudulent intent in conveying, etc.)

[2] Thus, structures upon land distinctly visible to the purchaser, have been held sufficient to put him on an inquiry, and to constitute notice to him of an existing easement. Raritan Water Power Co. v. Veghte, 21 N. J. Eq. (6 C. E. Green) 463, 478; Hoy v. Bramhall, 19 Id. (4 C. E. Green) 563; Randall v. Silverthorn, 4 Barr. 173. The fact that there were fourteen chimney pots on the top of a house, but only twelve flues in the house, was held to be notice to the purchaser of an easement for the passage of smoke held by an adjoining owner. Hervey v. Smith, 22 Beav. 299; and see Davies v. Sear, L. R., 7 Eq. 427; Blatchley v. Osborn, 33 Conn. 226, 233. In Paul v. Connersville etc. R. R., 51 Ind. 527, 530, it was held that a grantee of land with a graded railroad track openly across it having embankments and excavations plainly to be seen by the purchaser, takes with actual notice of all the rights in the land possessed by the railroad company; and a warranty deed from his grantor can not affect those rights.

[3] Kerns v. Swope, 2 Watts, 75; Hastings v. Cutler, 4 Fost. (N. H.) 481. In Kerns v. Swope, a deed of land lying in two counties was recorded in only one of these counties, so that the record was not a constructive notice with respect to the portion of land situate in the other county. The court held, in an elaborate opinion by Chief Justice Gibson, that a jury might infer, as a conclusion of fact, that the purchaser examined the records and so became acquainted with

§ 601. **Same: Effect of Explaining or Contradicting the Information Given.**—In concluding this branch of the discussion, the important question remains to be considered: How far may a party rely upon the whole of the information given or statement made to him in a case of actual notice? In other words, when information is given or a statement is made to a purchaser, which, standing alone, would be actual notice, or, at least, would be sufficient to put him upon an inquiry; but this is accompanied by further explanatory or contradictory declarations which tend to nullify or destroy the effect of the former language, how far may the purchaser accept and act upon the entire communication, or how far is he affected by that portion which tends to show the existence of a prior, outstanding, and conflicting claim? If the only information given to the purchaser concerning the existence of an outstanding claim, contract, or equity affecting the property, is communicated by a third person, a stranger having no interest in the matter, and this person also states that such contract has been rescinded, or such claim or equity has been abandoned or discharged, and no longer exists, the purchaser, it seems, may rely on the whole communication; it is not sufficient, in the absence of special reasons for believing the former part and rejecting the latter, to put him upon an inquiry, and does not therefore amount to an actual notice. This conclusion results from the obvious fact that such an informant has no personal interest to deceive the purchaser by misrepresenting or concealing the truth.[1]

the prior conveyance affecting the title to the whole land in both counties. The court further held that an inspection by the purchaser of a paper which purported to be a certified or official copy of a deed improperly recorded on account of a defective acknowledgment, where the copy disclosed this defect, was not a fact from which actual notice could be inferred, because it was not sufficient to put the purchaser on an inquiry. This decision seems to be unsound; at least, its correctness is very doubtful; it seems to misinterpret the nature of facts sufficient to put a purchaser upon inquiry, and to confound them with absolute and complete knowledge. Hastings v. Cutler, *supra*, holds, much more consistently as it seems to me, that the inspection of a writing which purports to be a certified copy of a recorded deed, although it shows that the record was improperly made, because the deed was defectively acknowledged, is a fact sufficient to put the purchaser on an inquiry, so that, if he neglected to make a proper inquiry, the inference of actual notice would be necessary. See Pringle v. Dunn, 37 Wisc. 449, 461–464, and Partridge v. Smith, 2 Biss. 183, 185, 186, as to the notice given by a defective record.

[1] *In re* Bright's Trusts, 21 Beav. 430; Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Blair, 4 Cushm. (Miss.) 309, 328; Rogers v. Wiley, 14 Ill. 65; Williamson v. Brown, 15 N. Y. 354, 360. In Pringle v. Dunn, 37 Wisc. 449, 465, 467, one purchaser "had heard that there was a defective railroad mortgage on the premises, but did not look for it because his abstract did not show it." Another purchaser of a parcel of the land "knew by report" that there was such a mortgage, etc. Both were held charged with actual notice; but it does not appear in the report of the case *from whom* the purchasers obtained the information.

When, however, the grantor, vendor, or mortgagor admits that his title was defective or incumbered, or that there was some outstanding claim upon or equity in the property, or makes any other communication which, unexplained, would constitute an actual notice, but adds a further declaration to the effect that such defect has been cured, or incumbrance removed, or claim or equity rescinded and destroyed, the purchaser, according to the weight of authority, is not warranted in accepting and relying upon this explanation or contradiction; the information obtained under such circumstances and from such a source is sufficient to put a prudent man upon an inquiry. The reason of this is plain. The informant is under a strong personal interest to misrepresent or conceal the real facts. While the former branch of his communication is made against his interest, and is therefore more likely to be true, the latter part is in conformity with his personal interest, and is essentially untrustworthy.[1] Finally, a purchaser is fully warranted in accepting and acting upon the statements or conduct of the person who holds or asserts a conflicting interest, claim, or right, if he, when interrogated upon the subject, either keeps silence, or denies the existence of any claim, or affirmatively declares it to be of a certain kind and amount; such a person, even if not absolutely estopped from afterwards setting up any claim, or a claim different from his representations, would certainly be debarred from afterwards alleging that the purchaser was put upon an inquiry, and was charged with notice.[2] If a purchaser, having been put upon an inquiry, prosecutes it with reasonable and due diligence without discovering any adverse right, the inference of an actual notice received by him is overcome and destroyed.[3] What is a due inquiry in these instances of actual notice inferred from circumstantial evidence, must, to a great

[1] Hudson v. Warner, 2 Har. & Gill, 415; Price v. McDonald, 1 Md. 403; Russell v. Petree, 10 B. Mon. 184; Bunting v. Ricks, 2 Dev. & Bat. Eq. 130; Littleton v. Giddings, 47 Tex. 109. This rule, however, is not pushed so far by the courts as to work real injustice to innocent purchasers who have been manifestly deceived and misled. See Jones v. Smith, 1 Hare, 43; Rogers v. Jones, 8 N. H. 264; Curtis v. Blair, 4 Cushm. (Miss.) 309, 328. In Chicago v. Witt, 75 Ill. 211, a grantee, some time before the conveyance was executed, was told by the grantor that he was not *then* able to make a good title, but that in a short time he would be able. It was held that no notice of an adverse unrecorded deed of the same land could be inferred. Ponder v. Scott, 44 Ala. 241, 244, 245.

[2] McGehee v. Gindrat, 20 Ala. 95; Massie v. Greenhow's Ex'rs, 2 Patton & Heath, 255; and see the following English authorities: Ibbotson v. Rhodes, 2 Vern. 554; Pearson v. Morgan, 2 Bro. Ch. 388; Bridge v. Beadon, L. R., 3 Eq. 664; Lee v. Howlett, 2 K. & J. 531; Burrowes v. Locke, 10 Ves. 470; Slim v. Croucher, 1 De G. F. & J. 518; Barry v. Croskey, 2 J. & H. 1, 21; 1 Dart on Vendors, c. 3, sec. 1, pp. 88, 89.

[3] See cases cited *ante* under §§ 596, 597.

extent, depend upon the particular facts of each case. It is well settled, however, that mere examination of the record, and finding no adverse title or claim recorded, is not due inquiry by one who has been put upon inquiry by circumstances tending to show the existence of a conflicting title, claim, or right.[1]

§ 602. **Same: By whom and when Information must be Given.**—Such being its general nature, it is impossible to define by a single formula what will amount to an actual notice sufficient to affect the conscience of the party receiving it, and courts have not attempted to lay down any such criterion; each case must, to a considerable extent, depend upon its own particular circumstances. The following ancillary rules, however, bearing upon the question, have been well settled. Where an actual notice is relied upon, in order to be binding it must come from some person interested in the property to be affected by it; and it is said that it must be given and received in the course of the very transaction itself concerning the property, in which the parties are then engaged. As a necessary consequence, no mere vague reports from strangers, nor mere general statements by individuals not interested in the property, that some other person claims a prior right or title, will amount to an actual notice so as to bind the conscience of the party; nor will he be bound by a notice given in some previous and distinct transaction, which he might have forgotten.[2] It should

[1] In Shotwell v. Harrison, 30 Mich. 179, and Munroe v. Eastman, 31 Id. 283, it was held that a purchaser who has such notice of a prior unrecorded deed, can not rely upon a mere search of the records without any other inquiry; the case of Barnard v. Campau, 29 Id. 162, was distinguished. In Pringle v. Dunn, 37 Wisc. 449, 465, 467, a purchaser "who had heard that there was a defective railroad mortgage on the premises, but did not look for it because his abstract did not show it," and another who "knew by report" that there was such a mortgage, but made no further examination, were both held charged with actual notice; Brinkman v. Jones, 44 Wisc. 498, 519. Littleton v. Giddings, 47 Tex. 109, holds that looking at the records and inquiring of the grantor is not enough, when an inquiry among the neighbors would have led to the truth; also that a notice given to a person who was actually interested in the purchase, although not named as a grantee in the conveyance, is notice to the grantee himself.

[2] See Sugden's Vend. & Purch., p. 755; Barnhart v. Greenshields, 9 Moore's P. C. 18, 36; Natal Land etc. Co. v. Good, L. R., 2 P. C. 121, 129; Butcher v. Stapely, 1 Vern. 363; Jolland v. Stainbridge, 3 Ves. 478; Fry v. Porter, 1 Mod. 300; Wildgoose v. Wayland, Gouldsb. 147, pl. 67. That mere vague statements, rumors, and reports coming from third persons not interested in the transaction, or from any other unauthentic source, and even vague, uncertain, and wholly general statements, coming from a person interested in the subject-matter, such as the vendor or the claimant himself, will not amount to an actual notice, and will not bind the conscience of a purchaser, is decided or laid down by way of a *dictum* in a multitude of cases: Chicago v. Witt, 75 Ill. 211 (insufficient statement from a grantor to the purchaser); Loughridge v. Bowland, 52 Miss. 546, 555 (rumors, suspicions, etc.); Reynolds v. Ruckman, 35 Mich. 80 (facts not amounting to notice); Lambert v. Newman, 56 Ala. 623, 625, 626 (vague

be most carefully observed that the decisions here referred to, and the rules which they sustain, are dealing exclusively with the artificial conception of an actual *notice*, which is regarded as affecting the conscience of the party, and producing results upon his rights, in the same manner and to the same extent, as though it amounted to full knowledge, although it may, perhaps, fall far short of such a consummation. The question as to the consequences of such knowledge acquired in some other manner or from some other source is, therefore, left untouched.

§ 603. **Effect of Knowledge.**—What, then, is the effect of actual knowledge of the prior fact, interest, claim, or right, acquired previously, or in an entirely different transaction, or from a stranger or person having no interest in the property, or even in an accidental and fortuitous manner? The answer on principle is very clear and certain. It was shown in a former paragraph that the conception of notice was introduced, and the rules concerning it were established, from considerations of policy and expediency based upon the common experience of mankind. Notice, even when actual, is not necessarily equivalent to knowledge; but the same effects must be attributed to it which would naturally flow from knowledge. It is treated as a representative of, or substitute for, actual knowledge, and is, therefore, in its essential nature, inferior to knowledge. It necessarily follows that whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice, and regulate the mode of its being given and received, there is no longer any need of invoking the legal conception of notice; the rules concerning it no longer apply; the very fact for which it is intended as a substitute has been more perfectly accomplished in another manner. To sum up in one statement, if the party has in any way obtained the full knowledge, those same results must necessarily, and even in

evidence of conversations); Parker v. Foy, 43 Miss. 260, 266; Wailes v. Cooper, 24 Id. 208 (rumors); Buttrick v. Holden, 13 Met. 355, 357; Curtis v. Blair, 4 Cushm. (Miss.) 309, 328; Peebles v. Reading, 8 Serg. & R. 484; Miller v. Cresson, 5 Watts & S. 284; Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7 Id. 261, 267, 274; Woods v. Farmere, 7 Id. 382, 387; Hood v. Fahnestock, 1 Barr. 470; Churcher v. Guernsey, 3 Wright, 84; Wilson v. McCullough, 11 Harris, 440; Van Duyne v. Vreeland, 1 Beasley, 142, 155; Butler v. Stevens, 26 Me. 484; Lamont v. Stimson, 5 Wisc. 443; Rogers v. Haskings, 14 Ga. 166; Maul v. Rider, 59 Pa. St. (9 P. F. Smith), 167, 171, 172 (general rumors); but as to notice not coming from the party interested, see Curtis v. Mundy, 3 Met. 405; Mulliken v. Graham, 72 Pa. St. 484, 490. That an actual notice given in a prior transaction is not notice in a subsequent and different one, see Lowther v. Carlton, 2 Atk. 242; Fuller v. Benett, 2 Hare, 394, 404; Boggs v. Varner, 6 Watts & S. 469; Meehan v. Williams, 12 Wright, 238; Bank of Louisville v. Curren, 36 Iowa, 555.

a higher degree, be attributed to it—the very substance itself—which are, from motives of general policy, attributed to notice as its representative and substitute. The conclusion thus reached upon principle is supported by the weight of judicial authority, and it will reconcile much, if not all, of the apparent confusion and conflict of opinion upon this subject to be found in some of the decisions.[1] Of course the knowledge here spoken of must be something more than the mental condition produced by rumors, casual conversations, and the like; more than any constructive notice; more even than the *mere* actual notice defined and permitted by the rules. It must appear that the mind of the party charged with the knowledge has been brought thereby to an intelligent apprehension of the nature of the prior fact, interest, claim, or right, so that a reasonable man, or an ordinary man of business, would act upon the information, and would regulate his conduct by it in the transaction or dealing in which he is engaged.[2] In accordance with principle, and as a conclusion from the decided cases, the following proposition may be formulated. If it can be shown that the party has in any way, from any person or source, by any means or method, for any purpose, although not in pursuance of the rules which regulate the giving of notice, obtained or derived actual and full *knowledge* of the kind above described, concerning the prior fact, interest, claim, or right—that is, a knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired in the transaction or dealing in which he is engaged, then the same results must follow from the knowledge so obtained which would follow from an actual notice communicated in the manner required by the rules governing notice; in other words, the conscience of the party having the knowledge is affected by it in the same manner and to the same extent as it would be affected by an actual notice.[3] It sometimes happens that, by a positive

[1] It can not be claimed that the views contained in the text are expressly adopted by all the decided cases. There is unfortunately a great lack of precision and accuracy in the language of too many judicial opinions; actual and constructive notice are sometimes not discriminated; notice and the evidence by which it is shown are often confounded; knowledge and notice are used interchangeably, as though they were exactly equivalent. However great an *appearance* of conflict there may be, the reasoning and conclusions of the text will, in my opinion, produce a consistent and harmonious system. See the cases cited in the next following note but one under this paragraph.

[2] Lloyd v. Banks, L. R., 3 Ch. 488, 490, *per* Lord Cairns.

[3] Lloyd v. Banks, L. R., 3 Ch. 488, 490, *per* Lord Cairns; In matter of Conrad Leiman, 32 Md. 225, 244; Price v. McDonald, 1 Id. 403; Winchester v. Baltimore etc. R. R., 4 Id. 231; Johns v. Scott, 5 Id. 81 (actual knowledge of a prior unrecorded deed); Brown v. Wells, 44 Ga. 573, 575 (grantee's actual knowledge that his

rule of the law, an actual and technical notice is necessary in order to put a person in default, or to perfect some legal right, and then knowledge, however complete, will not supersede or take the place of the notice. Actual knowledge, however, will generally have the same effect as notice in controversies concerning priority; but it is especially important in determining the existence of good faith; it is often a most essential element in making out a fraudulent intent, where a mere technical notice would not be sufficient.

§ 604. **Constructive Notice.**—Constructive notice assumes that no information concerning the prior fact, claim, or right, has been directly and personally communicated to the party; at least, such information is not shown by evidence, but is only *inferred by operation of legal presumptions*. It embraces all those instances, widely differing in their external features, in which, either from certain extraneous facts, or from certain acts or omissions of the party himself, disclosed by the evidence, the information is *conclusively presumed* to have been given to or received by him, or is inferred by a *prima facie* presumption of

grantor was a mere squatter without color of title defeated his own title, although he had continued in possession under it for seven years); Pringle v. Dunn, 37 Wisc. 449, 465–467 (the premises being incumbered by a prior unrecorded mortgage, one subsequent purchaser of a portion of them "had heard that there was a defective railroad mortgage upon the premises, but did not look for it because his abstract did not show it;" another purchaser of a different portion "knew by report" that there was such a mortgage. Both were held charged as though they had received an actual notice); Jones v. Lapham, 15 Kans. 540, 545, 546 (purchaser of the legal estate with full knowledge of an outstanding equitable interest, claim, or lien); Virgin v. Wingfield, 54 Ga. 451, 454, and cases cited (full knowledge has the effect of notice, and is evidence of fraud on the part of the grantee or purchaser); Blatchley v. Osborn, 33 Conn. 226, 233 (actual knowledge of an existing easement); Butcher v. Yokum, 61 Pa. St. (11 P. F. Sm.) 168, 171 (it is not essential that information should come from the party or his agent; it may come *aliunde*, provided it be of a character likely to obtain credit; knowledge was obtained from the grandfather of the equitable title belonging to infant heirs, by a purchaser of the legal title from the widow); Lawton v. Gordon, 37 Cal. 202, 205, 206 (a person about to purchase land was told by the recorder that the intended grantor had already given a deed of the property to another person, which had been filed for record but afterwards taken away from the office before recording. Held a sufficient knowledge; *such* information need not come from a person interested in the property. The court expressly placed the decision upon the distinction, as laid down in the text, between actual knowledge obtained in any authentic manner, and the technical actual notice); see, also, Dickerson v. Campbell, 32 Mo. 544 (where a clerk of a court obtained knowledge of prior equities through his familiarity with the records); Curtis v. Mundy, 3 Met. 405, 407, *per* Putnam, J.; Stevens v. Goodenough, 26 Vt. 676; Mulliken v. Graham, 72 Pa. St. (22 P. F. Sm.) 484, 490; Henry v. Raiman, 1 Casey (25 Pa. St.) 354; Phillipps v. Bank of Lewistown, 6 Harris (18 Pa. St.) 394, 404; McKinney v. Brights, 4 Id. (16 Pa. St.) 399; Vanduyne v. Vreeland, 1 Beasley, 142, 155; Rupert v. Mark, 15 Ill. 540; Cox v. Milner, 23 Id. 476; Hankinson v. Barbour, 29 Id. 80.

the law in the absence of contrary proof.[1] There is a marked inconsistency in the treatment of constructive notice by even the most eminent judges and text-writers. It has often been defined as knowledge or information inferred from certain circumstances, by a legal presumption of so high and conclusive a nature, that the party is not allowed to overcome the inference by any contrary evidence showing that in fact he had no knowledge nor information.[2] Notwithstanding this definition, writers and judges who adopt it have admitted into the class of constructive notice, and have treated as instances thereof, all those cases in which it is settled that the presumption of information being received is merely *prima facie*, and that the inference may be overcome by contrary evidence. The essential element of constructive as distinguished from actual notice certainly is the *legal presumption* that information has been communicated to or

[1] In the often quoted case of Espin v. Pemberton, 3 De G. & J. 547, 554, Lord Chan. Chelmsford made some observations concerning constructive notice. The case was one of notice to a party's attorney. The Lord Chancellor, admitting that it was treated as a species of constructive notice, thought that it had better be classed under the head of actual notice. "If a person employs a solicitor, who either knows or has imparted to him in the course of his employment some fact which affects the transaction, the principal is bound by the fact, whether it is communicated to or concealed from him." He then adds: "Constructive notice properly so called, is the knowledge [information?] which the courts impute to a person upon a presumption so strong of the existence of the knowledge, that it can not be allowed to be rebutted, either from his knowing something which ought to have put him upon farther inquiry, or from his willfully abstaining from inquiry to avoid notice. I should, therefore, prefer calling the knowledge which a person has, either by himself or through his agent, actual knowledge; or, if it is necessary to make a distinction between the knowledge which a person possesses himself, and that which is known to his agent, the latter might be called *imputed* knowledge." The entire view of the Chancellor in this extract is lacking in accuracy of thought from his confusion of *information* with knowledge. Some necessary criticism upon his description of "constructive notice," will be found in the text and in the next following note.

[2] Thus the English editor of the Equity Leading Cases, says: "Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted;" citing Eyre, C. B., in Plumb v. Fluitt, 2 Anst. 438; Kennedy v. Green, 3 My. & K. 699, 719 (2 Eq. Lead. Cas. 121; 4th Am. ed.) Judge Story gives exactly the same definition. 1 Story Eq. Jur., § 399. A recent editor of Judge Story's treatise adopts the same view in nearly the same language: "Constructive notice is thus a conclusive presumption." Id., § 410a. In Hewitt v. Loosemore, 9 Hare, 449, 455, Turner, V. C., said: "Constructive notice is knowledge which the court imputes to a party upon a presumption, so strong that it can not be allowed to be rebutted, that the knowledge must have been communicated." The American editor of the Equity Leading Cases says: "Constructive notice is a legal inference from established facts, and like other legal presumptions does not admit of dispute." (Vol. 2, p. 157, 4th Am. ed.) With respect to this last citation, it certainly can not be said of *all* legal presumptions that they "do not admit of dispute." "Legal presumptions" are sometimes conclusive, and sometimes rebuttable.

acquired by the party; but it is equally certain that this legal presumption may be conclusive, and may be rebuttable.[1]

§ 605. **Opinion of Wigram, V. C., in Jones v. Smith.**— It would be very difficult to formulate any statement which should embrace within its general terms all instances of constructive notice. The most important species, however, have been sufficiently settled by the decisions, and will be described in the subsequent paragraphs. The most comprehensive and accurate generalization ever attempted by any judge or text-writer, was made by Vice Chancellor Wigram, in the following passage which is well worthy of being quoted in full. "It is indeed, scarcely possible to declare *a priori* what shall be deemed constructive notice, because, unquestionably, what would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy, and without danger, assert that the cases in which constructive notice has been established, resolve themselves into two classes: *First*, cases in which the party charged has had actual notice that the property in dispute, was, in fact, charged, incumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after [i. e. concerning] the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and *secondly*, cases in which the court has been satisfied from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice. How reluctantly the court has applied, and within what strict limits it has confined, the latter class of cases, I shall presently consider. The proposition of law upon which the former class of cases proceeds, is not that the party charged had notice of a

[1] This view renders the classification simple, comprehensive, and certain. "Actual" and "constructive" notice, as defined in the text, are separated by a broad, clear, and natural line of distinction. Additional subdivisions into "constructive," "implied," "imputed" notice, and the like, are, as it seems to me, equally unnecessary and confusing. The explanation given by Lord Brougham in Kennedy v. Green, 3 My. & K. 699, 719, is, in my opinion, very forcible and accurate, since while admitting a legal presumption as the basis, it does not assert that the presumption is always conclusive. He says: "The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbid a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge."

fact or instrument which, in truth, related to the subject in dispute without his knowing that such was the case; but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds, is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from making such inquiries, for the purpose of avoiding knowledge; a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If in short there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to a purchaser, then the doctrine of constructive notice will not apply; then the purchaser will in equity be considered, as in fact he is, a *bona fide* purchaser without notice."[1] I would remark in passing, that the constructive notice to subsequent purchasers and incumbrancers resulting from the registration of a prior deed, mortgage, or other instrument, under the recording statutes of this country, does not seem to fall within either of Vice Chancellor Wigram's two classes; since it does not depend upon information or knowledge concerning any fact affecting the property sufficient to put the party upon an inquiry, which is the criterion of the first class, nor upon the party's willfully abstaining from seeking information, which is the test of the second class. In short, this species of constructive notice is wholly of statutory origin, and is not the result or application of any general doctrine.

§ 606. **When the Presumption is Rebuttable.**—Since constructive notice, as heretofore defined, includes all the instances in which information concerning a prior fact, claim, or right, is inferred either by a conclusive or by a rebuttable presumption

[1] Jones v. Smith, 1 Hare, 43, 55, 56. The Vice Chancellor quoted as examples of his two classes, the following cases: (1) *Of the first class*: Ferrars v. Cherry, 2 Vern. 383; Jackson v. Rowe, 2 S. & S. 472; Kennedy v. Green, 3 My. & K. 699; Taylor v. Baker, 5 Price, 306; Coppin v. Fernyhough, 2 Bro. Ch. 291; Davies v. Thomas, 2 Y. & C. 234; Eyre v. Dolphin, 2 Ba. & Be. 290; Malpas v. Ackland, 3 Russ. 273; Bisco v. Earl of Banbury, 1 Cas. in Chan. 257; Allen v. Anthony, 1 Meriv. 282; Daniels v. Davison, 17 Ves. 433; Taylor v. Stibbert, 2 Ves. 437. (2) *Of the second class:* Illustrations of and limitations on the doctrine. Whitbread v. Jordan, 1 Y. & C. 303; Birch v. Ellames, 2 Anst. 427; Hiern v. Mill, 13 Ves. 114; Miles v. Langley, 1 Russ. & My. 39; Hanbury v. Litchfield, 2 My. & K. 629; Hine v. Dodd, 2 Atk. 275; Plumb v. Fluitt, 2 Anst. 432; Evans v. Bicknell, 6 Ves. 174; Cothay v. Sydenham, 2 Bro. Ch. 391.

of law, it would be a most important aid in the further discussion, if we could discover a general criterion for distinguishing these two classes, and determining it what cases the presumption is conclusive, and in what it is only *prima facie* and rebuttable. It may not be possible to lay down a rule which is absolutely universal in its operation, and which furnishes a certain test for every case; but a rule may be formulated which is quite general in its application, and which gives a practical test sufficient for many instances differing widely in their external features.[1] Wherever a party has information or knowledge of

[1] Williamson v. Brown, 15 N. Y. 354, has been uniformly treated as an important and leading case. The controversy was concerning the priority between the plaintiff, who held under a subsequent conveyance of the land which was duly recorded, and the defendant who held a prior *unrecorded* mortgage. The defendant claimed that plaintiff took his deed with notice of the prior mortgage. On this issue the referee found: that the plaintiff, when he took his deed, did not have actual notice of the prior mortgage; but that he had sufficient information or belief of the existence of said mortgage to put him upon inquiry, and that he pursued such inquiry to the extent of his information and belief, and failed to discover that any such mortgage actually existed. This finding the court interpreted to mean, that the plaintiff made all the inquiry which it became his duty to make upon the information he had received; upon this interpretation, the court made its decision, and laid down certain general rules. It was held that upon the finding of fact no constructive notice had been given; the *prima facie* presumption was overcome. It will be observed that the finding does not specify the particulars nor nature of the information which was enough to put the plaintiff upon an inquiry; nor does it state the particulars of the inquiry which he made. The conclusions reached by the court, and rules laid down by them, are, therefore, general, and apply to all cases which could be properly described by this finding of facts. S. L. Selden, J., holds *first*, that constructive notice, as well as actual notice, will defeat the priority obtained under the recording statute by a previous record. Passing to the question now under consideration he quotes the definition of actual and of constructive notice, given in Story's treatise, § 399; he gives a recorded deed and notice to an agent as examples of constructive notice; because in each case the presumption is conclusive, and the party would not be allowed to show that he actually received no information. He adds some remarks concerning the various and inaccurate modes in which the terms "actual" and "constructive" have sometimes been used. The learned judge then proceeds (p. 360): "The phraseology uniformly used, as descriptive of the kind of notice in question, 'sufficient to put the party upon inquiry,' would seem to imply that if the party is faithful in making inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty, is he still to be bound, without any actual notice? The presumption of notice which arises from proof of that degree of knowledge which will put a party upon inquiry is, I apprehend, not a presumption of law but of fact, and may, therefore, be controverted by evidence." [I must remark at this point, that the mistake in the last sentence is inexplicable. Judge Selden has, in other opinions, described in the most clear and accurate manner, excelled in fact by no other judge, the true nature of legal presumptions, the distinctions between those which are conclusive and those which are *prima facie*, and that argumentative conclusions of fact *are not presumptions at all*, that the term "presumption of fact" is a misnomer. That a presumption "may be controverted by evidence," is not the test of a presumption being one of fact and not of law. The inference which is drawn from "information or knowl-

certain extraneous facts, *which do not of themselves constitute actual notice* of an existing interest, claim, or right in or to the subject-matter, but which are sufficient to put him upon an inquiry concerning the existence of a conflicting interest, claim, or right, then he is charged with constructive notice, because a presumption of law arises. This proposition is settled by an overwhelming weight of authority, English and American. A large number of particular instances or species of constructive notice are referable to and embraced within the general terms of this description. It should be carefully observed that the facts of which the party receives information or has knowledge, *do not directly tend to show* the existence of any conflicting interest or claim, and are therefore not *actual* notice; but they are sufficient, whatever be their nature and form, to put the party, as a reasonable man, upon further inquiry. As an illustration, if a party is negotiating for the purchase of certain land, and sees or learns that the land is not in the intended grantor's possession, but is possessed and occupied by a third person, a stranger, this fact of possession is sufficient to put the expected grantee upon an inquiry concerning the nature of the occupant's interest. The information or knowledge of such extraneous facts which are sufficient to put the party upon an inquiry, constitutes a constructive notice of the conflicting claim or interest which *does* exist, because a presumption thence arises. Another instance is much more common in England than in this coun-

edge of facts sufficient to put the party upon an inquiry," is, under every correct definition, a presumption of law, and not a mere argumentative deduction which a jury may or may not make; the only question is, whether it is a conclusive or a rebuttable presumption.] Judge Selden, in support of his position that the presumption under these circumstances may be rebutted by evidence, then cites and quotes from the opinions in Whitbread v. Boulnois, 1 Y. & C. 303, per Alderson, B.; Jones v. Smith, 1 Hare, 43; Hanbury v. Litchfield, 2 My. & K. 629; Flagg v. Mann, 2 Sumn. 486, 554, per Story, J.; and Rogers v. Jones, 8 N. H. 264, per Parker, J. In conclusion he states the general rule as follows (p. 362): "If these authorities are to be relied upon, and I see no reason to doubt their correctness, the true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, [is a mere inference of fact, and] may be repelled by proof that the purchaser failed to discover the prior right notwithstanding the exercise of proper diligence on his part." The general conclusion thus formulated, both as to the extent of the presumption—what is presumed—and its *prima facie* or rebuttable nature, is beyond a doubt correct. The dictum by which it is asserted to be "a mere inference of fact," is as clearly erroneous. Another opinion was also delivered by Mr. Justice Paige which arrived at the same result by substantially the same reasoning. Reed v. Gannon, 50 N. Y. 345, 349, 350.

try. If a person loans money upon the security of a mortgage or other equitable lien given upon land belonging to the borrower, and learns that the title-deeds are not in the possession of the borrower, but are in the possession of some third person, this is a constructive notice of any claim or interest in the land held by such third person; because the lender is put upon an inquiry, and a legal presumption arises from the facts. This presumption, in all cases of this class, is really a double one. The party is either presumed to have made the inquiry, and to have carried it out until he obtained full knowledge of the outstanding conflicting interest, claim, or right; or else to have intentionally and deliberately refrained from making the inquiry or following it up in a reasonable and proper manner, for the very purpose of avoiding the knowledge which he might have acquired. The presumption is clearly one of law, and not a mere inference of fact; because upon the bare proof that the party had the information of facts sufficient to put him upon an inquiry, the inference is at once made, without any further evidence in its support; and in the absence of all contrary evidence, it is absolute and conclusive.[1]

[1] Ratcliffe v. Barnard, L. R., 6 Ch. 652, 654; Maxfield v. Burton, Id. 17 Eq. 15, 18; Rolland v. Hart, Id., 6 Ch. 678, 681, 682; Broadbent v. Barlow, 3 De G. F. & J. 570, 581; Hunt v. Elmes, 2 Id. 578, 587, 588; Perry v. Holl, 2 Id. 38; Espin v. Pemberton, 3 De G. & J. 547, 554, 555; Roberts v. Croft, 2 Id. 1, 5, 6; Atterbury v. Wallis, 8 De G. M. & G. 454; Ware v. Lord Egmont, 4 Id. 460, 473, 474; Penny v. Watts, 1 Macn. & G. 150, 167; Jackson v. Rowe, 2 S. & S. 472; Hewitt v. Loosemore, 9 Hare, 449, 456, 458. In several of these later English cases, a very strong disposition has been shown to limit and restrict the effect of the constructive notice which arises from the existence of facts and circumstances sufficient to put the party on an inquiry. This limitation is applied both where the party made some inquiry and relied upon what he had learned thereby, and where he made no inquiry at all. The criterion to which I refer was fully stated in Ware v. Lord Egmont, 4 De G. M. & G. 460, 473, by Lord Cranworth, as follows: "I must not part with this case without expressing my entire concurrence in what has on many occasions, of late years, fallen from judges of great eminence, on the subject of constructive notice; namely, that it is highly inexpedient for courts of equity to extend the doctrine, to attempt to apply it to cases to which it has not hitherto been held applicable. Where a person has not *actual* notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he *ought* to have acquired, the notice with which it is sought to affect him, that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down." The first and leading case in which this restricted view was laid down, and which other decisions have followed and approved, was Hewitt v. Loosemore, 9 Hare, 449, 456, 458, decided by V. C. Turner, and see Woodworth v. Paige, 5 Ohio St. 70, 76. On the other hand, in Broadbent v.

§ 607. **Same: Rebutted by Due Inquiry.**—It may be stated as a general proposition that in all instances of constructive notice belonging to this class, where it arises from information of some extraneous facts, not of themselves tending to show an actual notice of the conflicting right, but sufficient to put a prudent man upon an inquiry, the constructive notice is not absolute; the legal presumption arising under the circumstances is only *prima facie;* it may be overcome by evidence, and the resulting notice may thereby be destroyed. Whenever, therefore, a party has merely received information, or has knowledge of such facts sufficient to put him on an inquiry, and this constitutes the sole foundation for inferring a constructive notice, he is allowed to rebut the *prima facie* presumption thence arising by evidence; and if he shows by convincing evidence that he did

Barlow, 3 De G. F. & J. 570, 581, Lord Chan. Campbell said: "By 'the means of knowledge' by which any one is to be affected, must be understood means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself." It is plain that the criterion as established by these most recent English cases, is no longer the mere want of that reasonable care and diligence in making an inquiry which would be used by a prudent man; the failure to prosecute or to make the inquiry must, under the circumstances, amount to gross or culpable negligence. It should be observed, however, that this rule is confined, and is intended to be confined, to that class of constructive notices in which the legal presumption is rebuttable.

The American courts do not appear to have adopted this most recent English rule; they seem to have adhered with great unanimity to the doctrine contained in the *dictum* above quoted from Lord Campbell. Wherever the facts and circumstances do not tend to show actual notice—in other words, where the facts and circumstances are not simply the circumstantial evidence of an actual notice—the test of constructive notice generally applied by the American courts has been, whether such facts are sufficient to put a prudent man upon an inquiry, and whether an inquiry has been prosecuted with reasonable care and diligence. Rogers v. Jones, 8 N. H. 264; Griffith v. Griffith, 1 Hoff. Ch. 153; Hull v. Noble, 40 Me. 459, 480; Warren v. Swett, 31 N. H. 332, 341, 342; Briggs v. Taylor, 28 Vt. 180; Littleton v. Giddings, 47 Tex. 109; Allen v. Poole, 54 Miss. 323; Wood v. Krebbs, 30 Gratt. 708; Cordova v. Hood, 17 Wall. 1, per Strong, J.; Brush v. Ware, 15 Peters, 93, 112; Helms v. Chadbourne, 45 Wisc. 60, 70, 71, 73; Chicago etc. R. R. v. Kennedy, 70 Ill. 350, 361, 362; Blanchard v. Wave, 43 Iowa, 530; 37 Id. 305; Loughridge v. Bowland, 52 Miss. 546, 553–555; Deason v. Taylor, 53 Miss. 697, 701; Brown v. Volkening, 64 N. Y. 76, 82; Cambridge Valley B'k v. Delano, 48 Id. 326, 336, 339; Bennett v. Buchan, 61 N. Y. 222, 225; Kellogg v. Smith, 26 Id. 18; Baker v. Bliss, 39 Id. 70, 74, 78; Reed v. Gannon, 50 Id. 345; Pendleton v. Fay, 2 Paige, 202, 205; Edwards v. Thompson, 71 N. C. 177, 179; Major v. Bukley, 51 Mo. 227, 231; Russell v. Sweezey, 22 Mich. 235, 239; O'Rourke v. O'Connor, 39 Cal. 442, 446; Dutton v. Warschauer, 21 Id. 609; Pell v. McElroy, 36 Id. 268; Witter v. Dudley, 42 Ala. 616, 621, 625; and many other cases cited in the preceding and the subsequent notes. It is sometimes difficult to distinguish a case of constructive notice arising from extraneous facts sufficient to put the party upon an inquiry from a case of mere actual notice depending upon circumstantial evidence; and the two have occasionally been confounded by the decisions themselves. The criterion as given in the text will, I think, render the distinction sufficiently plain and practical.

make the inquiry, and did prosecute it with all the care and diligence required of a reasonably prudent man, and that he failed to discover the existence of, or to obtain knowledge of, any conflicting claim, interest, or right, then the presumption of knowledge which had arisen against him will be completely overcome; the information of facts and circumstances which he had received will not amount to a constructive notice. What will amount to a due inquiry, must largely depend upon the circumstances of each case.[1] If, on the other hand, he fail to make

[1] The different species of constructive notice in which the legal presumption may thus be overcome seem to be the following: (1) That derived wholly from mere extraneous facts and circumstances which are said to put a party on an inquiry, which are matters *in pais*, and which generally consist of fraud, concealments, neglects, mistakes, and the like, by third persons; (2) That derived from the possession or tenancy of the property by some third person; and (3) To a partial extent that derived from the pendency of an action affecting the property. In the following species the constructive notice seems to be absolute and the presumption conclusive: (1) That derived from a statutory recording or registration in the United States; (2) That derived from the statutory *lis pendens;* (3) That derived from a definite recital or reference in an instrument forming an essential part of a party's chain of title; and (4) That affecting a principal where an actual or a constructive notice has been duly given to his proper agent. That the presumption *may* be overcome in the classes of cases first above mentioned, is either directly or inferentially held by the following decisions, among others: Williamson v. Brown, 15 N. Y. 354, 360; Flagg v. Mann, 2 Sumn. 486, 554, *per* Story, J.; Rogers v. Jones, 8 N. H. 264, *per* Parker, J.; Whitbread v. Boulnois, 1 Y. & C. 303, *per* Alderson, J.; Jones v. Smith, 1 Hare, 43, *per* Vice-Chancellor Wigram; Hanbury v. Litchfield, 2 My. & K. 629; Hunt v. Elmes, 2 De G. F. & J. 578; Espin v. Pemberton, 3 De G. & J. 547; Roberts v. Croft, 2 Id. 1; Ware v. Lord Egmont, 4 De G. M. & G. 460; Hewitt v. Loosemore, 9 Hare, 449; Griffith v. Griffith, 1 Hoff. Ch. 153.

Whenever a party has, by means of information concerning extraneous matters, been put upon inquiry, how this inquiry should be made, and how far it should be prosecuted, in order that the legal presumption may be overcome, and the constructive notice defeated, although the party may still have failed to ascertain the real truth, must largely depend upon the particular circumstances of each case; no universal rule is possible. Much help, however, may be derived from a comparison of the decisions, which I have arranged according to their general subject-matter:

(1) *Examination of the records.* Examination of the records is always necessary; and there could hardly be a "due inquiry" without it. If the information given points to the existence of some interest or claim, which, if it exists at all, must necessarily appear upon the record, then a search of the proper record, and a discovery that no such claim appeared therein, would generally be sufficient; the "due inquiry" would have been prosecuted. Barnard v. Campau, 29 Mich. 162; Jackson v. Van Valkenburg, 8 Cow. 260; Bellas v. McCarthy, 10 Watts, 13, 28; Van Keuren v. Cent. R. R., 38 N. J. Law (9 Vroom), 165, 167 (when a grantor remains in possession after conveyance, a purchaser from his *grantee* held not bound to inquire further than the record of his conveyance; the record of his deed sufficient; but see *per contra*, Illinois Cent. R. R. v. MCullough, 59 Ill. 166); Reynolds v. Ruckman, 35 Mich. 80.

In general, an examination of the records by such a party is not sufficient. If the information which puts him on an inquiry points to the existence of some matter *in pais*, some interest *dehors* the records, or which would not necessarily be shown by the records, then a search of the records alone is not "due inquiry." If, for example, the supposed claim was an easement, or a grantor's lien for pur-

any inquiry, or to prosecute one with due diligence to the end, the presumption remains operative, and the conclusion of a notice is absolute. The criterion thus laid down will serve to determine the *prima facie* nature of the presumption in a very large number of the instances which are properly referable to the class of "constructive notice."

§ 608. **When Conclusive.**—It should be added, for the purpose of concluding this general description, that the doctrine determining what constitutes a constructive notice under such circumstances, may be formulated in somewhat different terms, as follows: Whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to, nor tend to show, an *actual* notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right; *and the circumstances are*

chase price, and the like. Wilson v. Hunter, 30 Ind. 466, 472; Russell v. Sweezey, 22 Mich. 235, 239; Shotwell v. Harrison, 30 Id. 179; Munroe v. Eastman, 31 Id. 283; Deason v. Taylor, 53 Miss. 697, 701; Littleton v. Giddings, 47 Tex. 109; Baker v. Bliss, 39 N. Y. 70; Randall v. Silverthorn, 4 Barr, 173.

(2) *Inquiry from the grantor or vendor.* A purchaser who had been put on an inquiry should seek information from his grantor or vendor, and a failure to do so would generally show a lack of the due care and diligence in making the inquiry. There are cases which go to the length of holding that such a purchaser who neglects to question his grantor or vendor, will be charged with notice of all he could have learned. Sergeant v. Ingersoll, 7 Barr, 340; 3 Harris, 343, 348, 349. Under some circumstances it is possible that the information sought and obtained from the grantor or vendor would satisfy the requirements of the rule, and constitute the due inquiry. See Espin v. Pemberton, 3 De G. & J. 547, 556.

(3) *Inquiry from third persons.* Under many circumstances, an examination of the records and a questioning of the vendor would not be sufficient, unless the inquiry were further prosecuted among third persons from whom information could probably be obtained; a neglect to make such inquiry would not overcome the presumption. Thus, an omission to seek information from a third person who was in possession, or from a third person who was said or claimed to hold some lien or incumbrance thereon, would generally be a failure to prosecute the inquiry with due diligence. The cases on this particular subject are very numerous, depending upon a great diversity of facts. Littleton v. Giddings, 47 Tex. 109; Russell v. Sweezey, 22 Mich. 235, 239; Witter v. Dudley, 42 Ala. 616, 621, 625. The following recent English cases are illustrations of a failure to make "due inquiry," whereby the party remained charged with constructive notice: Hopgood v. Ernest, 3 De G. J. & S. 116, 121; Broadbent v. Barlow, 3 De G. F. & J. 570, 581; Atterbury v. Wallis, 8 De G. M. & G. 454; Penny v. Watts, 1 Macn. & G. 150, 165; Hewitt v. Loosemore, 9 Hare, 449, 456, 458; Maxfield v. Burton, L. R., 17 Eq. 15, 18; Pitcher v. Rawlins, Id., 11 Eq. 53; Briggs v. Jones, Id., 10 Eq. 92. In the following recent English cases it was held that the inquiry was sufficient, and the party was not affected with notice: Greenfield v. Edwards, 2 De G. J. & S. 582; Cory v. Eyre, 1 Id. 149, 168, 169; Hunt v. Elmes, 2 De G. F. & J. 578, 588; Perry v. Holl, 2 Id. 38, 53, 54; Espin v. Pemberton, 3 De G. & J. 547, 556; Roberts v. Croft, 2 Id. 1, 5, 6; Ware v. Lord Egmont, 4 De G. M. & G. 460, 473, 474; Hewitt v. Loosemore, 9 Hare, 449, 456, 458; Credland v. Potter, L. R., 10 Ch. 8; Ratcliffe v. Barnard, Id., 6 Ch. 652, 654; see, also, Epley v. Witherow, 7 Watts, 163, 167; McGehee v. Gindrat, 20 Ala. 95; Wilson v. McCullough, 11 Harris, 440.

such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth, to a knowledge of the interest, claim, or right which really exists; then the party is absolutely charged with a constructive notice of such interest, claim, or right. The presumption of knowledge is then conclusive. There is plainly nothing contradictory between this statement and the criterion laid down in the preceding paragraph; both are phases of the same doctrine. Since the facts are assumed to be such that an inquiry properly conducted would result in arriving at the truth, it would be impossible for the party to show by any evidence that he had duly prosecuted the inquiry, and had nevertheless failed to acquire the knowledge. If the facts of a particular case bring it within this description, the legal presumption becomes conclusive, and the constructive notice is absolute in its effects.[1]

§ 609. **Species of Constructive Notice.**—Having thus explained the nature of constructive notice, and discussed the general doctrines concerning it, I shall now describe its various kinds or species, and state the particular rules applicable to each. The following subdivision is accurate and sufficient; it is based upon natural lines of separation, and embraces every definite species recognized by the courts. These various kinds of constructive notice are: (1) That by extraneous facts, or matters *in pais*, generally involving acts of fraud or negligence; (2) That by possession or tenancy; (3) That by recital or reference in instruments of title; (4) That by *lis pendens*, including the statutory notice of a pending action; (5) That by judgments; (6) That by registration or recording of instruments; (7) That between a principal and his agent. These seven species will be examined in the order thus given.

§ 610. **1. By Extraneous Facts, Generally Acts of Fraud, Negligence, or Mistake.**—The criterion in all instances of this species is, that the party had knowledge or information of certain matters *in pais* which, although not directly tending to show the existence of a prior conflicting right, are sufficient to put him as a prudent man upon an inquiry; and he

[1] It is in pursuance of this general proposition, that the constructive notice from recitals contained in a deed forming a necessary link in a party's chain of title, and that chargeable upon a principal when given to an agent, and that derived from a *lis pendens* and from registration, are absolute in their effects, the legal presumptions being conclusive. In support of the general rule, as given in the text, see the following cases among others: Helms v. Chadbourne, 45 Wisc. 60, 70, 71; Chicago etc. R. R. v. Kennedy, 70 Ill. 350, 361; Loughridge v. Bowland, 52 Miss. 546, 553; Maul v. Rider, 59 Pa. St. (9 P. F. Sm.) 167, 171; Mullison's estate, 68 Id. (18 P. F. Sm.) 212; Kennedy v. Green, 3 My. & K. 699.

is charged with constructive notice of all that he might have learned by an inquiry prosecuted with reasonable diligence; a legal presumption arises that he *has* obtained information of what he might thus have learned. In every such case the first question is, whether the facts, of which the party has information, *are* sufficient to put him upon an inquiry, so as to raise the *prima facie* presumption; the further question is then presented, whether he has made a due inquiry without discovering the truth, so as to overcome the presumption and defeat the notice, or whether he has so neglected this duty that the presumption remains unshaken and the notice effective. A third question might be suggested, whether he had made an inquiry and had ascertained the whole truth concerning the prior conflicting right, so that the constructive notice would in reality be turned into actual knowledge or actual notice. I would remark that in many of the decisions involving this species of notice, it will be seen upon a careful examination, that the point actually determined by the court was not whether the party had made a due and reasonable inquiry, but whether the facts were sufficient to put him upon *any* inquiry, so that his failure to inquire would be a fatal neglect. It is plain from the discussions of the preceding paragraphs, that in all instances belonging to this species, the legal presumption upon which constructive notice always rests is only *prima facie*, and may be overcome by evidence clearly showing that the inquiry was duly prosecuted without success. Before describing the particular cases falling under this head, it is proper to mention the difficulty which may sometimes exist, of distinguishing this kind of constructive notice from those instances of actual notice which are established merely by circumstantial evidence. In fact, there are decisions which make no attempt to distinguish them; the terms "constructive notice" and "actual notice" have been applied indiscriminately to the same condition of circumstances. The distinction, however, exists, and is fundamental. Whatever may be the language of judicial *dicta*, it is settled beyond a doubt, that in one case the actual notice is argumentatively inferred as a conclusion of fact, by the jury or other tribunal, from the circumstances which put the party upon an inquiry; and in the other case the constructive notice is inferred by the court as a presumption or conclusion of law from the same kind of circumstances, in the absence of contrary evidence.[1] I shall

[1] These propositions are so fully examined in the preceding paragraphs, that no further citation of authorities in their support is necessary. Cases belonging to this first species of constructive notice are much more com-

now mention the most important instances which properly belong to this branch of constructive notice.

§ 611. **Visible Objects and Structures.**—If a purchaser sees or has knowledge of, or by the ordinary use of his senses might see or know of, visible material objects or structures upon or connected with the land or other subject-matter concerning which he is dealing, he may and generally will be charged with a constructive notice of any easement or other similar right, the existence of which would be reasonably suggested to him by the appearance of such material object. He is put upon an inquiry, and is presumed to have ascertained whatever he might have learned by prosecuting the inquiry in a due and reasonable manner.[1]

§ 612. **Absence of Title-deeds.**—The case belonging to

mon in England than in the United States; indeed, a very large proportion of the English decisions concerning constructive notice must be referred to this head. The reason is obvious. In England the absence of any general system of recording renders it possible for titles to be affected in a vast number of modes by matters *in pais*, by matters resting in the knowledge of particular individuals, and which can only be ascertained by a special inquiry. The universal system of recording in this country largely diminishes the possibility of titles being thus affected by extraneous matters.

[1] Hervey v. Smith, 22 Beav. 299; Davies v. Sear, L. R., 7 Eq. 427, 432, 433; Morland v. Cook, Id., 6 Eq. 252, 263, 265; Raritan Water P. Co. v. Veghte, 21 N. J. Eq. (6 C. E. Green), 463, 478; Hoy v. Bramhall, 19 Id. (4 C. E. Green), 563; Randall v. Silverthorn, 4 Barr. 173; Paul v. Connersville etc. R. R., 51 Ind. 527, 530. In Hervey v. Smith, *supra*, there were fourteen chimney-pots visible on the roof of a house, but only twelve flues in the house; and the purchaser was held charged with constructive notice of an easement for the passage of smoke in favor of an adjoining dwelling. This decision has been criticised. In Davies v. Sear, *supra*, an open archway in a house visible to the purchaser, was held constructive notice of a right of way through the premises enjoyed by a neighboring owner. In Morland v. Cook, *supra*, lands on the coast were purchased which were below the level of the sea, and which together with a larger extent of adjacent land, were protected by a sea-wall. The purchaser was held to be charged with constructive notice of a covenant providing for the maintenance of the sea-wall which constituted an equitable charge upon the land so bought. In Raritan etc. Co. v. Veghte, *supra*, a mill-race and dam were held constructive notice of easements for the use of water rights incumbering the property; while in Paul v. Connersville etc. R. R., a graded railway track across a farm was held notice of all the rights of the railroad. See also Allen v. Seckham, L. R., 11 Ch. D. 790, 794; Suffield v. Brown, 9 Jur. (N. S.) 999; 33 L. J. (Ch.) 249, *per* Lord Romilly, M. R., and 10 Jur. (N. S.) 111; 33 L. J. (Ch.) 256, *per* Lord Westbury; Pyer v. Carter, 1 H. & N. 916; Ewart v. Cochrane, 4 Macq. 117; Dann v. Spurrier, 7 Ves. 231; Clements v. Welles, L. R., 1 Eq. 200; Wilson v. Hart, Id., 1 Ch. 463. Exactly the same question *in principle* sometimes arises in suits for the specific performance of contracts, where the vendee, being familiar with the premises, or having seen them shortly before entering into the contract, is held charged with constructive notice of easements, and other similar rights affecting the land, which are reasonably suggested by the visible appearance of material structures or of modes in which the premises are used and occupied. See Shackleton v. Sutcliffe, 1 De G. & Sm. 609; Grant v. Munt, Coop. 173; Pope v. Garland, 4 Y. & C. Ex. 394; Bowles v. Round, 5 Ves. 508; Dyer v. Hargrave, 10 Id. 506.

this head which most frequently occurs in England, is that arising from the absence of the title-deeds, or their non-production by the owner of land with whom an intended purchaser or incumbrancer is dealing. From the peculiar system of conveyancing and land titles prevailing in England, the owner of a *legal* estate in fee or for life is entitled and is presumed to have the title-deeds and other muniments of title constituting the written evidence of his estate in his own possession or under his personal and immediate control. The inability to produce the title-deeds, and especially their possession by a stranger, would indicate that some equitable or perhaps legal interest, mortgage, or lien had been created and was outstanding.[1] The three following general rules may be considered as definitely settled by a strong preponderance of authority, and especially by the more recent and carefully considered decisions of the English courts. It should be observed that they are given as *general* rules; their application must largely depend upon and vary with the changing circumstances of particular cases. If a purchaser or incumbrancer dealing with the apparent owner of an estate learns or is informed that the title-deeds are in the possession of a third person, this will in general be a constructive notice of any interest in or claim upon the estate held by such person; and will certainly be a notice, if the party thus receiving the information intentionally omits to make any inquiry into the nature and objects of the stranger's possession.[2] On the other hand, it is now thoroughly settled that the *mere* absence or non-production of the title-deeds is not of itself a constructive notice to a purchaser or incumbrancer, if he in good faith inquires for them, and a reasonable excuse for their non-appearance is given. His omission to make further in-

[1] In fact the possession, by the apparent owner of the legal estate, of *all* the title-deeds, is quite analogous to, though not of course exactly identical with, a perfect record title in the United States. A purchaser dealing with the legal owner in England, and finding him in possession of *all* the title-deeds, is in a position quite similar to that of a purchaser in this country who has made a search and finds the owner's title on the records clear and unincumbered. While in neither case is such purchaser *absolutely* secure against unknown outstanding claims, in both he stands in a like position of advantage and protection.

[2] Dryden v. Frost, 3 My. & Cr. 670, 673, per Lord Cottenham; Hiern v. Mill, 13 Ves. 114; Birch v. Ellames, 2 Anst. 427; Bradley v. Riches, L. R., 9 Ch. D. 189, 195, 196; Maxfield v. Burton, L. R., 17 Eq. 15, 18 (the purchaser was informed that the deeds were in the possession of a third person, and simply neglected to make any inquiry; it did not appear that his neglect was intentional or willful). Upon substantially the same grounds it was held in Kellogg v. Smith, 26 N. Y. 18, 23, that the purchaser of a bond and mortgage who fails to require the production of the bond, it being in fact not produced, is charged with notice of any defects in his assignor's title.

quiry is not the "culpable neglect" which the English courts now require under such circumstances in order to charge the party with notice. Exactly the same rule has been applied by several of the cases to a somewhat different state of facts. If deeds *are* produced and delivered to the purchaser or incumbrancer, which are represented to be all of the muniments of title, while in fact they are not all, but some of the deeds affecting the title are in possession of a third person; his omission to examine the deeds thus delivered to him and to discover the defect, is not the culpable neglect which renders him chargeable with notice.[1] Finally, if a purchaser or incumbrancer fails to make any inquiries concerning the title-deeds of the property for which he is dealing, this is under the English system a "culpable negligence," and he is thereby charged with constructive notice of all the facts which he might have learned by means of a due inquiry.[2]

§ 613. **Other Matters in Pais.**—As might be supposed from our wholly different system of conveyancing and titles, instances of constructive notice by the absence or non-production of title-deeds seldom if ever arise in this country. The same general rule, however, is applied by our courts in all analogous cases. If a purchaser or incumbrancer, dealing concerning property of which the record title appears to be complete and perfect, has information of extraneous facts or matters *in pais*, sufficient to put him on inquiry respecting some unrecorded conveyance, mortgage, or incumbrance, or respecting some outstanding interest, claim, or right which is not the subject of record, and he omits to make a proper inquiry, he will

[1] Dixon v. Muckleston, L. R., 8 Ch. 155, 158, 161; Ratcliffe v. Barnard, Id., 6 Ch. 652, 654; Hunt v. Elmes, 2 De G. F. & J. 578, 588; 28 Beav. 631; Perry v. Holl, 2 De G. F. & J. 38, 53, 54; Espin v. Pemberton, 3 De G. & J. 547, 556; 4 Drew. 333; Roberts v. Croft, 2 De G. & J. 1, 5, 6; 24 Beav. 223; Hewitt v. Loosemore, 9 Hare, 449, 456, 458; Colyer v. Finch, 5 H. L. Cas. 905; Finch v. Shaw, 19 Beav. 500; Dowle v. Saunders, 2 Hem. & M. 242; Hipkins v. Amery, 2 Giff. 292; Farrow v. Rees, 4 Beav. 18; Evans v. Bicknell, 6 Ves. 174; Plumb v. Fluitt, 2 Anst. 432; and see Ware v. Lord Egmont, 4 De G. M. & G. 460, 473, 474; Greenfield v. Edwards, 2 De G. J. & S. 582; Cory v. Eyre, 1 Id. 149, 168, 169; Perry Herrick v. Attwood, 2 De G. & J. 21, 37.

[2] Such conduct is the willful shutting one's eyes to the truth, and omitting to inquire for the very purpose of avoiding information, spoken of by Vice-Chancellor Wigram in the passage quoted in a preceding paragraph. Hewitt v. Loosemore, 9 Hare, 449, 458; Hopgood v. Ernest, 3 De G. J. & S. 116, 121; Atterbury v. Wallis, 8 De G. M. & G. 454, 466; Maxfield v. Burton, L. R., 17 Eq. 15, 18; Bradley v. Riches, L. R., 9 Ch. D. 189, 195, 196; Finch v. Shaw, 19 Beav. 500, 511; Jones v. Williams, 24 Id. 47; Peto v. Hammond, 30 Id. 495; Allen v. Knight, 5 Hare, 272; Jones v. Smith, 1 Id. 43; 1 Ph. 244; Worthington v. Morgan, 16 Sim. 547; Jackson v. Rowe, 2 S. & S. 472.

be charged with constructive notice of all the facts which he might have learned by means of a due and reasonable inquiry [1]

§ 614. **2. By Possession or Tenancy.**—The general rule is well settled in England that a purchaser or incumbrancer of an estate, who knows or is properly informed that it is in the possession of a person other than the vendor or mortgagor with whom he is dealing, is thereby charged with a constructive notice of all the interests, rights, and equities which such possessor may have in the land. He is put upon an inquiry concerning the grounds and reasons of the stranger's occupation; and is presumed to have knowledge of all that he might have learned by means of an inquiry duly and reasonably prosecuted. If he neglects to make any inquiry, or to make it with due diligence, the presumption and notice of course remain absolute.[2] The

[1] This inquiry, as has been shown, sometimes should be made of the grantor or vendor, and sometimes of third persons, according to the circumstances of each case. Epley v. Witherow, 7 Watts, 163, 167; Jaques v. Weeks, 7 Id. 261, 274; Buttrick v. Holden, 13 Metc. 355, 357; Sergeant v. Ingersoll, 7 Barr. 340; 3 Harris, 343, 348, 349; Warren v. Swett, 31 N. H. 332, 341; Littleton v. Giddings, 47 Tex. 109; Helms v. Chadbourne, 45 Wisc. 60, 70; Shepardson v. Stevens, 71 Ill. 646; Erickson v. Rafferty, 79 Id. 209, 212; Buck v. Paine, 50 Miss. 648, 655; Maul v. Rider, 59 Pa. St. (9 P. F. Sm.) 167, 171; Stearns v. Gage, 79 N. Y. 102, 107; Baker v. Bliss, 39 Id. 70.

[2] Taylor v. Stibbert, 2 Ves. 437, 440, per Lord Rosslyn; Holmes v. Powell, 8 De G. M. & G. 572, 580, 581; Penny v. Watts, 1 Macn. & G. 150, 165. The general rule was so clearly and accurately stated by L. J. Knight-Bruce, in the recent case of Holmes v. Powell, *supra*, that I shall quote a passage of his opinion (p. 580): "I apprehend that by the law of England, when a man is *of right* and *de facto* in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who *knows* or who *can not be heard to deny that he knows* another to be in possession of certain property, can not for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which or in respect of which the former is and claims to be in that possession. Lord Eldon's language in Allen v. Anthony, 1 Meriv. 282, 284, recognizes, as I understand it, both rules. But possession of a corporeal hereditament to be effectual need not be continually visible or without cessation actively asserted. If a man has once received rightful and actual possession of land, he may go to any distance from it without authorizing any servant or agent or other person to enter upon it or look after it; he may leave it for years uncultivated and unused; he may set no mark of ownership upon it; and his possession may nevertheless still continue, at least until his conduct afford evidence of intentional abandonment, which such conduct, as I have mentioned, would not necessarily do. Suppose, for example, a purchase of a tract of woodland, and the purchaser, after possession given him, to leave it wholly neglected, uninhabited, untouched, unvisited, unseen, for years, the possession is not thus lost. * * * * It is unnecessary for me to repeat that I have uniformly been using the word 'possession' as meaning 'occupation,' and not as including that kind of possession of a corporeal hereditament which a man has by receiving compensation or remuneration for the occupation of it by another." The judge, in support of these conclusions referred to the following decis-

same general rule based upon the same motives and reasons, has been established in the United States by a very great number of decisions and judicial *dicta*.[1] In by far the larger portion of English cases, the possession has been that of a tenant or lessee, while in this country the instances of notice by mere tenancy are comparatively few. I shall therefore treat the effect of tenancy as a particular application of the more general doctrine concerning notice by possession. In discussing the entire subject, I shall endeavor (1), to define with accuracy and precision the general rules which have been settled in the United States, with their limitations and exceptions; (2), to determine the extent of the notice, of what rights belonging to the occupant his possession is notice, and the effects thereof on the rights of the one receiving the notice; (3), to ascertain what kind, amount, and length of possession is necessary or sufficient in various classes of cases; (4), to inquire whether the presumption arising from the possession is conclusive or rebuttable; and (5), to consider the case of possession by a tenant or lessee, and the particular rules connected therewith.

§ 615. **General Rules.**—Two leading and entirely distinct rules have been settled in the United States as well as in England, and the failure to recognize this fact has, as it seems to me, sometimes produced confusion and uncertainty in dealing with the general subject. In the first place, it is clearly established by many decisions of the highest authority, that an actual, open, visible, and exclusive possession of a definite tract of land by one rightfully in possession or holding under a valid title, is a constructive notice to subsequent purchasers and incumbrancers of whatever estate or interest in the land is held

ions: Hardy v. Reeves, 5 Ves. 426; Taylor v. Stibbert, 2 Id. 437; Daniels v. Davison, 16 Id. 249; 17 Id. 433; Norway v. Rowe, 19 Id. 144; Gordon v. Gordon, 3 Sw. 400; Miles v. Langley, 1 Russ. & My. 39; White v. Wakefield, 7 Sim. 401; Oxwith v. Plummer, 2 Vern. 636.

[1] Rogers v. Jones, 8 N. H. 264; Hull v. Noble, 40 Me. 459, 480; Johnson v. Clarke, 18 Kans. 157, 164; School Dist. v. Taylor, 19 Id. 287; Tankard v. Tankard, 79 N. C. 54, 56; Edward v. Thompson, 71 Id. 177; Noyes v. Hall, 7 Otto, 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Id. 210; Dunlap v. Wilson, 32 Id. 517; Strickland v. Kirk, 51 Miss. 795, 797; Loughridge v. Bowland, 52 Id. 546, 553; Moss v. Atkinson, 44 Cal. 3, 17; Killey v. Wilson, 33 Id. 690; Russell v. Sweezey, 22 Mich. 235, 239; Sears v. Munson, 23 Iowa, 380; Phillips v. Costley, 40 Ala. 486; McKinzie v. Perrill, 15 Ohio St. 162; Perkins v. Swank, 43 Miss. 349; Glidewell v. Spaugh, 26 Ind. 319; Warren v. Richmond, 53 Ill. 52; Reeves v. Ayers, 38 Id. 418; Keys v. Test, 33 Id. 316; Bank of Orleans v. Flagg, 3 Barb. Ch. 316; Diehl v. Page, 3 N. J. Eq. (2 Green Ch.) 143; Baldwin v. Johnson, Saxton, 441; Woods v. Farmere, 7 Watts, 382; Sailor v. Hertzog, 4 Whart. 259; Ringold v. Bryan, 3 Md. Ch. 488; Baynard v. Norris, 5 Gill, 468; Webber v. Tavlor, 2 Jones Eq. 9.

by the occupant, equivalent in its extent and effects to the notice given by the recording or registration of his title. The constructive notice thus described, like that arising from a record or registration, does not seem to require nor to depend upon any actual knowledge or information of the possession communicated to or had by the subsequent purchaser, since he is held to be charged with notice even though he is a resident of another state.[1] This rule is plainly the same as the first one laid down by Lord Justice Knight-Bruce in the opinion quoted under the last preceding paragraph.[2] The *rationale* seems to be that as the occupant's title is a good one, and as his possession is notorious and exclusive, a purchaser would certainly arrive at the truth upon making any due inquiry. The purchaser can not say, and can not be allowed to say, that he made a proper inquiry, and failed to ascertain the truth. The notice, therefore, upon the same motives of expediency, is made as absolute as in the case of a registration. The second of the two rules is undoubtedly the one which is sustained by the greatest number of decisions. It must not be supposed, however, that there is any conflict between them; nor that the same court might not, under proper circumstances, adopt both. Whenever a party, dealing as purchaser or incumbrancer with respect to a parcel of land, is informed or knows, or is in a condition which prevents him from denying that he knows, that the premises are in the possession of a third person, other than the one with whom he is dealing as owner, he is thereby put upon an inquiry, and is charged with constructive notice of all the facts concerning the occupant's right, title, and interest which he might have ascertained by means of a due inquiry. A legal presumption arises that he possesses all the knowledge which he could have acquired by such an inquiry.[3]

[1] This rule seems to have its special and most usual application between prior grantees of land whose deeds have not been put on record, and subsequent grantees or incumbrancers whose deeds or mortgages *have* been recorded. The *rightful* possession under such circumstances is held to produce the same effect as that produced by a record. Noyes v. Hall, 7 Otto, 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Ill. 210; Brown v. Gaffney, 28 Ill. 157; Dunlap v. Wilson, 32 Id. 517; Bradley v. Snyder, 14 Id. 263; Tankard v. Tankard, 79 N. C. 54, 56; Edwards v. Thompson, 71 N. C. 177, 179; Webber v. Taylor, 2 Jones Eq. 9; Taylor v. Kelly, 3 Id. 240 (in Edwards v. Thompson, *supra*, it was said that the purchaser was thus charged with notice although he lived in another state); School Dist. v. Taylor, 19 Kans. 287; Emmons v. Murray, 16 N. H. 385; Farmers L. & T. Co. v. Maltby, 8 Paige, 361; Doyle v. Stevens, 4 Mich. 87.

[2] Holmes v. Powell, 8 De G. M. & G. 572, 580.

[3] Rogers v. Jones, 8 N. H. 264; Hull v. Noble, 40 Me. 459, 480; Johnson v. Clark, 18 Kans. 157, 164; Mullins v. Wimberly, 50 Tex. 457, 464; Watkins v. Edwards, 23 Id. 443; Strick-

It follows as a necessary consequence of these rules that when a grantee or a vendee, whose deed or contract is not recorded, is in actual possession of the land conveyed or agreed to be conveyed to him, his possession is constructive notice to a subsequent grantee of the same premises whose deed *is* put upon record, and his title takes precedence of such subsequent but recorded deed.[1]

§ 616. **Extent and Effect of the Notice.**—There appears to be some disagreement among the American decisions concerning the question of what rights and interests held by the occupant his possession is a constructive notice. It is firmly settled in England that the possession of a tenant or lessee is not only notice of all rights and interests connected with or growing out of the tenancy itself or the lease, but is also notice of all interests acquired by collateral and even subsequent agreements. If, for example, a tenant should enter under his lease alone, and should afterwards make an agreement for the purchase of the land, his possession would be notice to a subsequent purchaser of his rights as vendee, as well as of those belonging to him as lessee.[2] It would seem that the principle of these decisions extended to all persons in possession, whether as lessees, vendees, mortgagees, or otherwise. It has accordingly been

land v. Kirk, 51 Miss. 795, 797; Loughridge v. Bowland, 52 Id. 546, 553, 554; Brown v. Volkening, 64 N. Y. 76, 82, 83; Van Kueren v. Cent. R. R., 38 N. J. L. (9 Vroom) 165, 167; Moss v. Atkinson, 44 Cal. 3, 17; Killey v. Wilson, 33 Id. 690; Rogers v. Hussey, 36 Iowa, 664; Ill. Cent. R. R. v. McCullough, 59 Ill. 166; Tunison v. Chamblin, 88 Id. 378, 390; Warren v. Richmond, 53 Id. 52; Russell v. Sweezey, 22 Mich. 235, 239; Perkins v. Swank, 43 Miss. 349, 361; O'Rourke v. O'Connor, 39 Cal. 442, 446; Pell v. McElroy, 36 Id. 268; Dutton v. Warschauer, 21 Id. 609; Smith v. Gibson, 15 Minn. 89, 99; Bogue v. Williams, 48 Ill. 371; and see cases *ante*, under § 614.

[1] Strickland v. Kirk, 51 Miss. 795, 797; Moss v. Atkinson, 44 Cal. 3, 17 (the vendee may enforce his contract against such subsequent grantee); Killey v. Wilson, 33 Id. 690; Tunison v. Chamblin, 88 Ill. 378, 390 (if the second grantee takes possession, equity will cancel his deed as a cloud upon the first grantee's title, and will restore possession to the first grantee); Russell v. Sweezey, 22 Mich. 235, 239; Warren v. Richmond, 53 Ill. 52; Doolittle v. Cook, 75 Id. 354; Cabeen v. Breckenridge, 48 Id. 91, 93; Perkins v. Swank, 43 Miss. 349, 361; Dixon v. Lacoste, 1 Sm. & Mar. 107; Bk. of Orleans v. Flagg, 3 Barb. Ch. 316; Braman v, Wilkinson, 3 Barb. 151 (possession by a vendee). It will be seen that there is an exception to this particular rule in some states, where actual notice of a prior unrecorded instrument is necessary, and mere possession is held not to be such actual notice. See *post*, subdivision on "Recording."

[2] Daniels v. Davison, 16 Ves. 249; 17 Id. 433; Taylor v. Stibbert, 2 Id. 437; Allen v. Anthony, 1 Meriv. 282; Meux v. Maltby, 2 Sw. 281; Crofton v. Ormsby, 2 Sch. & Lef. 583; Powell v. Dillon, 2 Ball & B. 416; Lewis v. Bond, 18 Beav. 85; Wilbraham v. Livesey, 18 Id. 206; Moreland v. Richardson, 24 Id. 33; Bailey v. Richardson, 9 Hare, 734; Barnhart v. Greenshields, 9 Moore P. C. 33, 34; and for limitations on the rule see Hanbury v. Litchfield, 2 My. & K. 629, 633, *per* Lord Cottenham; Jones v. Smith, 1 Hare, 43, 62.

adopted and followed by some of the American cases, which hold that a possession originally acquired by one right or in one manner, is notice of all other rights subsequently and differently obtained and held by the occupant, unless there is something in the circumstances of the case which has actually misled the purchaser who is to be affected by the notice.[1] Exactly the opposite conclusion has, however, been reached by cases which hold that a possession begun under one kind of right is not notice of any other or different interest subsequently obtained by the occupant, unless there was something special in the circumstances which might draw the purchaser's attention to the change of title, and thus operate rather as an actual than a constructive notice.[2] The decisions may be regarded as agreeing upon the conclusion, which also seems to be in perfect harmony with sound principle, that where *a* title under which the occupant holds has been put on record, and his possession is consistent with what thus appears of record, it shall not be a constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, and has had no actual notice beyond what is thereby disclosed.[3]

§ 617. **Grantor Remaining in Possession.**—The last mentioned rule has frequently been invoked where a grantor, having executed a deed absolute on its face which is put upon record, remains in possession of the land by virtue of some arrangement or relation between himself and his grantee *dehors* the

[1] In my opinion, these decisions are much more in harmony with the general doctrine than those others which have speculated and drawn refined distinctions upon the amount of notice derived from the occupant's original right to the possession. The reasons upon which the whole doctrine rests seem to be conclusive. The possession of a third person is said to put a purchaser upon an inquiry; and he is charged with notice of all that he might have learned by a due and reasonable inquiry. Clearly a purchaser who is thus put upon inquiry is bound to inquire of the occupant with respect to *every* ground, source, and right of his possession; anything short of this would clearly fail to be the "due and reasonable inquiry." See Kerr v. Day, 2 Harris, 112; Wood v. Farmere, 7 Watts, 382; Matthews v. Demerritt, 22 Me. 312; McKecknie v. Hoskins, 23 Id. 230; Rogers v. Jones, 8 N. H. 264; Daubenspeck v. Platt, 22 Cal. 330.

[2] McMechan v. Griffing, 3 Pick. 154; Kendall v. Lawrence, 22 Id. 542; Bush v. Golden, 17 Conn. 594, 602; Williams v. Sprigg, 6 Ohio St. 585; Matthews v. Demerritt, 22 Me. 312, 313; Dawson v. Danbury B'k, 15 Mich. 489.

[3] Plumer v. Robertson, 6 Serg. & R. 184, *per* Tilghman, C. J.; Woods v. Farmere, 7 Watts, 382, 388; Great Falls Co. v. Worster, 15 N. H. 412; Smith v. Yule, 31 Cal. 180; and see White v. Wakefield, 7 Sim. 401; Rice v. Rice, 2 Drew. 1; Muir v. Jolly, 26 Beav. 143; Staples v. Fenton, 5 Hun, 172; and see Bell v. Twilight, 18 N. H. 159. Where A. gives a mortgage by absolute deed with defeasance to B., and the deed is recorded but the defeasance is not, and A. remains in possession, his possession, if known by them, has been held a sufficient notice to grantees from B., Daubenspeck v. Platt, 22 Cal. 330; but *per contra*, Crassen v. Swoveland, 22 Ind. 427; Newhall v. Pierce, 5 Pick. 450; and see Corpman v. Baccastow, 84 Pa. St. 363.

deed and the record which entitles him to the possession, such as a collateral agreement which really turns the deed into a mortgage, a lien for the unpaid purchase price, an unrecorded mortgage, and the like. In England, if a grantor has signed the usual receipt for the whole purchase money indorsed upon his conveyance, his continued possession is not a constructive notice of any lien he may have for the unpaid price. The receipt in such a case is analogous to the record of the deed in the United States, and a subsequent purchaser from the grantee has a right to rely upon it.[1] There has been a direct conflict of opinion among the American courts in applying the rule to the condition of facts above described. In one group of decisions the possession of the grantor is held not to be a constructive notice of any right or interest he may have antagonistic to his deed which has been put upon record; a subsequent purchaser, it is said, has a right to rely upon the information derived, or which would be derived from the record, and to assume that the grantor's continued possession is merely by sufferance.[2] Another group reaches a conclusion directly the contrary to this, and holds that a purchaser is put upon an inquiry and is affected by a constructive notice in the same manner as in any other case of possession by a third person.[3]

§ 618. **Tenant's Possession, How Far Notice of Lessor's Title.**—Whether possession by a tenant is constructive notice of his landlord's title, is also a question upon which the decisions are in direct conflict. In England it seems to be set-

[1] White v. Wakefield, 7 Sim. 401; Rice v. Rice, 2 Drew. 1; Muir v. Jolly, 26 Beav. 143.

[2] Van Keuren v. Cent. R. R., 38 N. J. Law (9 Vroom), 165, 167. This case while admitting that in general possession is constructive notice, holds in the most emphatic manner that this does not apply to a grantor remaining in possession after his conveyance. A purchaser from his grantee is not thereby bound to inquire whether he retained any interest; his deed absolute in form is conclusive, and the purchaser can safely rely on it. Bloomer v. Henderson, 8 Mich. 395, 404, 405; Scott v. Gallagher, 14 Serg. & R. 333, 334; Newhall v. Pierce, 5 Pick. 450; and see also for *dicta* or reasoning pointing to the same conclusion, N. Y. Life Ins. Co. v. Cutler, 3 Sandf. Ch. 176, 179; Woods v. Farmere, 7 Watts, 382; and the opinions in Jaques v. Weeks, 7 Id. 261, 272, 287. As to possession of a mortgagor after foreclosure sale, see Dawson v. Danbury B'k, 15 Mich. 489; Cook v. Travis, 20 N. Y. 400; Reed v. Gannon, 50 Id. 345, 350.

[3] Ill. Cent. R. R. v. McCullough, 59 Ill. 166. This case lays down the rule generally that when a grantor continues in possession, this is constructive notice to a subsequent purchaser from his grantee of all his rights and equities in the land. It was applied to a grantor whose deed, having been delivered as an escrow until the price had been paid by the grantee, was put upon record in violation of this arrangement Metropolitan B'k v. Godfrey, 23 Ill. 579, 607, and cases cited; Pell v. McElroy, 36 Cal. 268, 278; Wright v. Bates, 13 Vt. 341, 350; Grimstone v. Carter, 3 Paige, 421, 439; Hopkins v. Garrard, 7 B. Mon. 312; Webster v. Maddox, 6 Me. 256; McKecknie v. Hoskins, 23 Id. 230; Jaques v. Weeks, 7 Watts, 261.

tled that the possession by a tenant, or notice of a tenancy, will not affect a purchaser with constructive notice of the landlord's title.[1] The same view has been adopted by several American decisions.[2] In the greater number of American cases, however, it is held that a purchaser is bound to make inquiry from the tenant in possession with respect to *all* the rights and interests which he claims to have, and under which he occupies, and is presumed to know all the facts which he might have learned by such an inquiry; he must pursue his inquiry to the final source of the tenant's right, and is thus affected with a constructive notice of the landlord's title and estate.[3]

§ 619. **Nature and Time of the Possession.**—Under this head, the kind, extent, and time of the possession necessary or sufficient to constitute a constructive notice will be examined. The determination of this question must largely depend upon the circumstances or conditions of fact under which it arises, and upon the immediate purpose or object for which the protection by a notice is invoked. Thus the question may arise between the rightful holder of a prior unrecorded title, and a subsequent purchaser whose conveyance is recorded; and it may therefore come within the first rule as stated in a former paragraph,[4] where the possession of a person rightfully entitled is equivalent, in its effects as notice, to a registration; or it may arise in other circumstances, which are not directly affected by the recording acts, and which are governed by the second general rule concerning the effect of possession as notice. A failure to recognize the difference existing between these two kinds of cases will undoubtedly account for whatever of confusion and conflict of opinion may be found in the decisions upon this subject.

§ 620. **Actual, Open, Exclusive Occupancy.**—It is therefore abundantly settled by the decisions, that where the first general rule as stated in a foregoing paragraph is invoked, and the party rightfully in possession under an unrecorded

[1] The rule is so stated by the English editor of Equity Leading Cases, vol. 2, p. 133 (4th Am. ed.); Jones v. Smith, 1 Hare, 43, 63, per Wigram V. C.; Barnhart v. Greenshields, 9 Moore P. C. 36. And it is held that where the tenant in possession holds under a derivative lease, his possession is not a notice to a purchaser of the covenants contained in the original lease. Hanbury v. Litchfield, 2 My. & K. 629, 633.

[2] Flagg v. Mann, 2 Sumner, 486, 557; Beattie v. Butler, 21 Mo. 313; and see Veazie v. Parker, 23 Id. 170; Jacques v. Weeks, 7 Watts, 261, 272, *per* Sergeant J.

[3] Edwards v. Thompson, 71 N. C. 177, 179 (possession by a tenant is the same, with respect to notice, as possession by his landlord); O'Rourke v. O'Connor, 39 Cal. 442, 446; Cunningham v. Pattee, 99 Mass. 248, 252; Kerr v. Day, 14 Pa. St. 112; and see *post*, § 625.

[4] *Ante*, § 615.

conveyance relies upon the fact of such possession as a constructive notice equivalent in its effects to a registration, to a subsequent grantee or incumbrancer whose deed or mortgage has been recorded, his possession must be an actual, open, distinct, notorious, and exclusive *occupancy* of the land in question. No mere occupation of the premises in common or in connection with a third person, and no mere exercise of acts of ownership equivocal in their nature, over the land, will then suffice.[1]

§ 621. **Vacant Premises: Constructive Possession.**—

[1] It can not be pretended that all of the decisions expressly and distinctly refer the necessity of such open, notorious, and exclusive occupancy to the cases in which the first general rule as formulated above is relied upon. In some of the decisions cited below the requirement of such a kind of occupancy seems to be stated in the most general manner, without any limitation or restriction, as though it applied to every instance of possession operating as a constructive notice. Notwithstanding this apparent confusion in some of the decisions, I think the true rule, established alike by the weight of judicial authority and by principle, is that laid down in the text; it reconciles all apparent conflict of judicial *dicta*, and produces a systematic and harmonious result. See Holmes v. Powell, 8 De G. M. & G. 572, 580; Noyes v. Hall, 7 Otto, 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Id. 210; Dunlap v. Wilson, 32 Id. 517; Bradley v. Snyder, 14 Id. 263; Tankard v. Tankard, 79 N. C. 54, 56; Edwards v. Thompson, 71 Id. 177, 179; Webber v. Taylor, 2 Jones Eq. 9; Taylor v. Kelly, 3 Id. 240; Butler v. Stevens, 26 Me. 484 (possession as against a subsequent grantee whose deed is first recorded, under a statute requiring *actual* notice, must be an actual, open, and exclusive occupancy. Grantor conveyed in fee, and the grantee recorded his deed, and entered upon the premises. The grantor continued to occupy *with the grantee;* held not a sufficient possession to be notice of any interest held by the grantor); Bell v. Twilight, 22 N. H. 500, 519 (to be notice of a prior unrecorded deed, as against a subsequent recorded deed or mortgage, the possession must be exclusive and unequivocal, a mixed possession is not sufficient); Wright v. Wood, 11 Harris, 120, 130, 131 (the general rule is admitted, but held not to apply to the case of a mere intruder; the possession must be of one *claiming a right*); Coleman v. Barklew, 3 Dutcher, 357, 359 (possession of a first grantee whose deed is not recorded, may be notice to a second grantee whose deed is recorded; but it must be actual, distinct, and manifested by such acts of ownership as would naturally be observed and known by others; *e. g.*, land with no buildings was used by the first grantee and others for pasturing cattle, and this was held not such a visible, open, exclusive possession as would constitute a notice to the second grantee); to the same effect are Williams v. Spriggs, 6 Ohio St. 585, 594; Ely v. Wilcox, 20 Wisc. 523, 531; Wickes v. Lake, 25 Id. 71; Troy City B'k v. Wilcox, 24 Id. 671; Bogue v. Williams, 48 Ill. 371; Patten v. Moore, 32 N. H. 382; Martin v. Jackson, 3 Casey, 504, 506; Mehan v. Williams, 12 Wright, 258; McMechan v. Griffing, 3 Pick. 149; Holmes v. Stout, 3 Green's Ch. 492; 2 Stockt. Ch. 419 (mere cutting timber on the premises from time to time is not a sufficient possession); Brown v. Volkening, 64 N. Y. 76, 82, 83. On the other hand, in Krider v. Lafferty, 1 Whart. 303, a grantee whose deed was not registered, took possession of the ground, planted it with willows so as to obtain materials in his trade of basket-making, and continued to use the land in this manner, growing the willows and cutting them every year for his business. This was held to be a change in the condition of the premises and a visible occupation of them sufficient to affect a subsequent purchaser with notice. In Hatch v. Bigelow, 39 Ill. 136, paving the sidewalk in front of a lot, putting up a placard on the lot offering it for sale, and receiving applicants and referring them to the party's agent, were held a sufficient possession of the lot to constitute notice.

If the possession is vacant at the time when the contract, conveyance, or mortgage is executed, that is, if the premises are entirely unoccupied, the purchaser can not be affected by any notice arising from possession. He is not thereby put upon an inquiry concerning the title or interest of the last occupant who has given up the possession, and is not charged with a constructive notice of facts which he might have learned by means of such inquiry.[1] While this rule is equally clear and just in its theory, great doubt and difficulty might arise in its application, especially under the conditions of land ownership which ordinarily exist in this country. Does the vacancy of possession within the true meaning of the rule include every case where the premises are not in the visible, actual, continuous occupation of some person claiming a right as owner, tenant, or otherwise; or is it confined to those cases where no person is known to exercise any acts of dominion or ownership over the land? The answer to this question given by the English courts is very definite and certain. It is well settled in England that the possession which may amount to a constructive notice, need not be that of the actual occupant, the terre-tenant. Where the purchaser of land has knowledge or information that its rents and profits are received by a person other than his grantor or vendor, who claims to be the owner, this fact is constructive notice to the purchaser of the title and interest of the one thus receiving the rents and profits, and of the rights of all parties holding under such title.[2] It is also settled by the English decisions, that a rightful possession, in order to put a subsequent purchaser upon inquiry, and to affect him with constructive notice, need not be an actual occupation continually visible or actively asserted without cessation. "If a man has once received rightful and actual possession of land, he may go to any distance from it without authorizing any servant, or agent, or other person to enter upon it or look after it, may leave it for years uncultivated and unused, may set no mark of ownership upon it, and his possession may, nevertheless, still continue, at least, unless his conduct afford evidence of intentional abandonment,

[1] Miles v. Langley, 1 Russ. & My. 39; 2 Id. 626; Jones v. Smith, 1 Hare, 43, 62; Meehan v. Williams, 12 Wright (48 Pa. St.), 238; Boggs v. Varner, 6 W. & Serg. 474; Hewes v. Wiswell, 8 Me. 94.

[2] Knight v. Bowyer, 2 De G. & J. 421; 23 Beav. 609. Of course the *mere fact* that a third person is receiving the rents and profits is not of itself any notice to a purchaser; the purchaser must receive information or acquire knowledge of such fact in order that he may be affected with notice. It is plain also that this particular case falls under the second general rule as stated *ante*, in § 615.

which such conduct as I have mentioned would not necessarily do."[1] In order that such a *constructive* possession by a person claiming rightfully, should charge the purchaser with notice of the party's interests, the purchaser must receive information or have knowledge of the *actual* possession originally taken, the *actual* occupation of the premises originally maintained by the adverse claimant. Unless this prior fact should be brought to the knowledge of the purchaser, there would certainly be nothing in the circumstances described sufficient to put him upon an inquiry. The effect thus given to a mere *constructive* possession by the English courts, can not be reconciled, in my opinion, with rules concerning the notice resulting from possession which have been established in this country by the overwhelming weight of authority, especially when taken in connection with our statutory system of recording, and the judicial interpretation which has been given to that legislation. It seems to be a necessary conclusion from the unvarying line of decisions, some of which are cited in the foregoing paragraphs, that as against a subsequent grantee or incumbrancer whose deed or mortgage has been duly recorded, no *mere constructive* possession of a prior and even rightful claimant, consisting only of an original act of taking actual possession, followed by a leaving of the premises entirely vacant and unoccupied, can amount to the constructive notice from possession as recognized by the American law. This result seems necessarily to follow from the provisions of the recording acts, and the judicial interpretation given to them in many of the states.[2]

§ 622. **Time of the Possession.**—In order that any kind of possession, whether actual and visible, or simply constructive, or consisting in the rightful receipt of rents and profits, may put a purchaser upon an inquiry, and operate as a constructive notice, it must exist at the time of the transaction by which his rights and interests are created. A possession which had ended before, or which did not commence until after, the sale to him

[1] Holmes v. Powell, 8 De G. M. & G. 572, 581, per Turner, L. J.; see *ante*, § 614, note, where the passage is quoted in full. See also to the same general effect Wilson v. Hart, L. R., 1 Ch. 463, 467; 2 H. & M. 551; Clements v. Welles, L. R., 1 Eq. 200; 35 Beav. 513; Feilden v. Slater, Id., 7 Eq. 523; Parker v. Whyte, 1 H. & M. 167; and compare the American cases Hatch v. Bigelow, 39 Ill. 136; Krider v. Lafferty, 1 Whart. 303.

[2] See Brown v. Volkening, 64 N. Y. 76, 82, 83, in which the effect of a mere *constructive* possession as operating to charge a subsequent purchaser with notice under the recording statutes, is discussed, and the positions of the text are fully sustained.

was made, or the conveyance or incumbrance was executed, could not affect him with any constructive notice.[1]

§ 623. **The Presumption is Rebuttable.**—We have seen that the *rationale* of the doctrine consists in the legal presumption that the party dealing with respect to the estate, seeing, hearing, or learning that it was possessed by a stranger, thereupon made an inquiry into the grounds of such possession, and became informed of all the facts which could be ascertained through a diligent inquiry, and this presumed information is the constructive notice. The question is, therefore, a vital one, whether this legal presumption is absolute and conclusive, so that the party is necessarily charged with the notice, or whether it is only *prima facie* and rebuttable. In a very large number of the decided cases, the language used by the court, while dealing with constructive notice arising from possession, does undoubtedly speak of this presumption without any limitations as though it were absolute and conclusive, and as though the constructive notice were necessary and certain.[2] If we should rely solely upon the general language of these judicial *dicta*, and upon the great preponderance in numbers of the cases in which such expressions of opinion are to be found, we should certainly be compelled to regard the question as definitely answered, the presumption as absolute and conclusive. When, however, we examine these judicial utterances, when we apply to them the settled rules of interpretation, when we go below their surface and discover the real points *decided*, we shall find that the courts have not, in the vast majority of instances, consciously and intentionally defined the nature of the presumption, and have not in an authoritative manner passed upon the question. Such a scrutiny will show very clearly that in by far the greater number of these decisions the real nature of the presumption was not consciously and intentionally before the courts for examination. The cases referred to, with a few possible exceptions, belong to one or another of the three following groups: (1) In some of them the court is simply announcing, in its most general form, the doctrine concerning constructive notice arising from possession by a stranger. The general rule is stated in its broadest manner; all special facts and circumstances which might modify it, are passed over in silence; all restrictions and limitations which might apply to it, are tacitly

[1] Meehan v. Williams, 12 Wright (48 Pa. St.) 238; Boggs v. Varner, 6 Watts & S. 474; Hewes v. Wiswell, 8 Me. 94; Wright v. Wood, 11 Harris (23 Pa. St.) 120, 130, 131.

[2] See *ante*, cases under §§ 614, 615.

ignored, or postponed for future consideration whenever occasion may require it.[1] The sweeping language used by judges in cases of this kind, is clearly not decisive upon the nature of the presumption. (2) A second group includes those cases in which, upon the special facts and circumstances before it, the court really decides that a purchaser or incumbrancer, knowing the fact of possession by a stranger, and being put upon inquiry thereby, has either wholly neglected to make any inquiry, or has failed to prosecute it with due diligence, and is therefore *conclusively* presumed to have obtained full information, and is absolutely charged with notice. In cases of this kind, the language of the judges, however general it may be, must, upon the most elementary rules of interpretation, be confined to the very facts of the particular controversy; and the court only intends to decide that a party being put upon an inquiry, and failing to prosecute the inquiry in a proper manner, is conclusively presumed to have obtained all the information possible, and is affected with an absolute notice.[2] In still a third group the courts have merely held that where a prior grantee is in *rightful* possession under an unrecorded conveyance, and his possession is open, notorious, visible, and exclusive, a subsequent purchaser or incumbrancer, even though his deed or mortgage is put upon record, becomes charged with an absolute notice. This is, as it seems to me, only another mode of stating the well-settled rule, that when a party is put upon an inquiry, and the circumstances are such that the inquiry if duly prosecuted must necessarily lead to knowledge of the prior adverse title, the presumption that he obtained the knowledge is conclusive. In short, the facts of these cases are so strong, that the party put upon the inquiry can not by any evidence rebut and overcome the *prima facie* presumption.[3]

[1] See *ante*, cases under §§ 614, 615.

[2] Many of the cases which *seem* to treat the presumption as conclusive, properly belong to this group. Gouverneur v. Lynch, 2 Paige, 300; Grimstone v. Carter, 3 Id. 421; Brice v. Brice, 5 Barb. 533; Tuttle v. Jackson, 6 Wend. 213; Hanly v. Morse, 32 Me. 287; McLaughlin v. Shepherd, Id. 143; Webster v. Maddox, 6 Greenl. 256; Kent v. Plummer, 7 Id. 464; Jaques v. Weeks, 7 Watts, 272; Kerr v. Day, 2 Harris, 112; Hardy v. Summers, 10 Gill & J. 316; Macon v. Sheppard, 2 Humph. 335; Morton v. Robards, 4 Dana, 258; Brush v. Halloway, 2 J. J. Marsh. 180; Burt v. Cassety, 12 Ala. 739; Scroggins v. Dougal, 8 Id. 382; and see notes under §§ 614, 615.

[3] School Dist. v. Taylor, 19 Kans. 287; Noyes v. Hall, 7 Otto, 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Id. 210; Dunlap v. Wilson, 32 Id. 577; Emmons v. Murray, 16 N. H. 385; Farmers L. & T. Co. v. Maltby, 8 Paige, 361; Strickland v. Kirk, 51 Miss. 795, 797; Moss v. Atkinson, 44 Cal. 3, 17; Killey v. Wilson, 33 Id. 690; Russell v. Sweezey, 22 Mich. 235, 239; Tunison v. Chamblin, 88 Ill. 378, 390. And see Tankard v. Tankard, 79 N. C. 54, 56; Edwards v. Thompson, 71 Id. 177, 179.

§ 624. **Same Continued.**—There is, on the other hand, an able and well-considered series of decisions in which the nature of the legal presumption arising from possession has been directly and intentionally examined. In all these cases where the court has deliberately met the question, has intentionally investigated the presumption arising from possession, and has definitely passed upon its nature, it has been held that the presumption, under ordinary circumstances, or independently of special and controlling circumstances, is not a conclusive one, but is only *prima facie*, and may be rebutted and overcome by proper evidence showing that the party has made a diligent inquiry and has nevertheless failed to discover the real truth concerning the existence of an adverse right or interest. This conclusion may be considered as settled by the decided weight of judicial authority, English and American.[1] It is also in complete conformity with principle. Undoubtedly, in ordinary cases, where a third person is possessed under a claim of right or title which is actually valid, an inquiry prosecuted with reasonable diligence from parties naturally conversant with the facts, will generally result in a discovery of the truth; and the presumption thus becomes conclusive, not because it is essentially so, but because it is necessarily confirmed by the existing facts—no evidence can overturn it. A different condition of circumstances, however, might easily exist, and often does exist. The purchaser put upon an inquiry might exhaust all the reasonable modes of acquiring knowledge; he might receive incorrect information from the parties acquainted with the real facts, and on whom he had a right to rely; he might even be misled by the person in possession; he might act in the most perfect good faith, and come to the reasonable conclusion that the possession was not based upon any adverse claim, and was wholly subordinate to his own right and that of his immediate grantor or mortgagor. To say that the presumption is, under such circumstances, conclusive, and the constructive

[1] Whitbread v. Jordan, 1 Y. & C. 303, *per* Alderson, B.; Jones v. Smith, 1 Hare, 43, 60–70, *per* Wigram, V. C.; Hanbury v. Litchfield, 2 My. & K. 629, 633; Williamson v. Brown, 15 N. Y. 354, 360, 362 (see opinion quoted *ante*, in note under § 606); Thompson v. Pioche, 44 Cal. 508, 516; Fair v. Stevenot, 29 Id. 486; Rogers v. Jones, 8 N. H. 264; Flagg v. Mann, 2 Sumn. 486, 554; Kerr v. Day, 2 Harris (14 Pa. St.), 112; and see on the general question of the presumption arising from facts sufficient to put a party upon inquiry, being overcome by evidence of an inquiry diligently made but unsuccessful, Penny v. Watts, 1 Macn. & G. 150; Ware v. Lord Egmont, 4 De G. M. & G. 460; Roberts v. Croft, 2 De G. & J. 1; Espin v. Pemberton, 3 Id. 547; Hunt v. Elmes, 2 De G. F. & J. 578; Hewitt v. Loosemore, 9 Hare, 449.

notice is absolute, would be to violate all the equitable reasons upon which the whole doctrine of constructive notice is founded.[1]

§ 625. **Possession by a Lessee or Tenant.**—It is the settled rule in England that possession by a lessee is constructive notice to a purchaser not only of the tenant's rights and interests directly growing out of or connected with the lease itself, but also of all rights and interests which he may have acquired by other and collateral agreements, as, for example, from a contract to convey the land, or to renew the lease, and the like. This rule has also been adopted by American courts.[2] It applies to a lessee, a sub-lessee, and a tenant from year to year.[3] Upon the question whether the lessee's possession is also a constructive notice of the lessor's title, there seems to be a conflict among the English and American decisions. It is settled in England that a purchaser or incumbrancer is not, by such possession, charged with a constructive notice of the nature or extent of the landlord's title and interest.[4] This restrictive rule of the English courts has been adopted and followed by some of the American cases.[5] Another and more numerous group of decisions by the courts of various states, hold that a purchaser, by means of a lessee's possession, is put upon an inquiry respecting all the rights and interests under which he holds and which affect the property, and is therefore charged with a constructive notice of the lessor's title and

[1] As a simple illustration: Suppose the subsequent purchaser, who is put upon an inquiry, should go to the party in possession, and should categorically demand from him an explanation, a statement of the right under which he claimed to hold his possession; and he should be told in explicit terms that the possession was based upon no right, was merely by sufferance of the owner and grantor, and that it could not in any way interfere with the purchaser's title. Would the possessor be permitted to contest the purchaser's right, to allege that he was charged with notice because the presumption arising from his own possession was conclusive? See Leach v. Ansbacher, 55 Pa. St. (5 P. F. Sm.) 85.

[2] Daniels v. Davison, 16 Ves. 249; 17 Id. 433; Douglas v. Witterwronge (cited), 16 Id. 253; Knight v. Bowyer, 23 Beav. 609, 641; Lewis v. Bond, 18 Id. 85; Wilbraham v. Livesey, 18 Id. 206; Meux v. Maltby, 2 Sw. 277, 281; Crofton v. Ormsby, 2 Sch. & Lef. 583; Powell v. Dillon, 2 Ball & B. 416; Bailey v. Richardson, 9 Hare, 734; Barnhart v. Greenshields, 9 Moo. P. C. 18, 33, 34; Kerr v. Day, 2 Harris (14 Pa. St.), 112; Cunningham v. Pattee, 99 Mass. 248, 252.

[3] Feilden v. Slater, L. R., 7 Eq. 523; Parker v. Whyte, 1 H. & M. 167; Wilson v. Hart, L. R., 1 Ch. 463; 2 H. & M. 551; Clements v. Welles, L. R., 1 Eq. 200; 35 Beav. 513.

[4] Jones v. Smith, 1 Hare, 43, 63, *per* Wigram, V. C.; Barnhart v. Greenshields, 9 Moo. P. C. 18, 36; and when the person in actual possession is a sub-lessee, a purchaser is not thereby affected with notice of covenants contained in the original lease from which his right is derived. Hanbury v. Litchfield, 2 My. & K. 629, 633; Jones v. Smith, 1 Hare, 43, 62; and see *ante*, § 618.

[5] Flagg v. Mann, 2 Sumn. 486, 557; Jaques v. Weeks, 7 Watts, 261, 272; Beatie v. Butler, 21 Mo. 313.

estate.[1] From the number and authority of the decisions by which it is sustained, this conclusion may justly be regarded as the American doctrine.

§ 626. **3. By Recital or Reference in Instruments of Title—General Rule.**—Wherever a purchaser holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate, which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title. The reasons for this doctrine are obvious and most convincing; in fact, there could be no security in land ownership unless it were strictly enforced. The right of such a purchaser is, under our system of conveyancing, confined to the instruments which constitute his chain of title, which are his title-deeds; and everything appearing in those instruments and forming a legitimate part thereof, is a necessary element of his title. The *rationale* of the rule is equally clear and certain. Any description, recital of fact, reference to other documents, puts the purchaser upon an inquiry; he is bound to follow up this inquiry step by step, from one discovery to another, from one instrument to another, until the whole series of title-deeds is exhausted, and a complete knowledge of all the matters referred to in their provisions and affecting the estate is obtained. Being thus put upon the inquiry, he is conclusively presumed to have prosecuted it until its final result, and with ultimate success. The purchaser's ignorance that a particular instrument forming a link in his chain of title was in existence, and his consequent failure to examine it, would not in the slightest affect the operation of the rule. An imperative duty is laid upon him to ascertain *all* the instruments which constitute essential parts of his title, and to inform himself of all that they contain.[2]

[1] O'Rourke v. O'Connor, 39 Cal. 442, 446; Thompson v. Pioche, 44 Id. 508, 516; Dickey v. Lyon, 19 Iowa, 544; Nelson v. Wade, 21 Id. 49; Morrison v. March, 4 Minn. 422; The Bank v. Godfrey, 23 Ill. 579, 607; Pittman v. Gaty, 5 Gilm. 186; The Bank v. Flagg, 3 Barb. Ch. 316; Kerr v. Day, 2 Harris (14 Pa. St.) 112; Sergeant v. Ingersoll, 3 Id. (15 Pa. St.) 343, 348; Wright v. Wood, 11 Id. (23 Pa. St.) 120, 130; Hood v. Fahnestock, 1 Barr, 470; Sailor v. Hertzog, 4 Whart. 259.

[2] Frye v. Partridge, 82 Ill. 267, 270; Chicago etc. R. R. v. Kennedy, 70 Id. 350, 361, 362; Rupert v. Mark, 15 Id. 540; Merrick v. Wallace, 19 Id. 486; Morrison v. Kelly, 22 Id. 610; Morris v. Hoyle, 37 Id. 150; Doyle v. Teas, 4 Scam. 202; McConnell v. Reed, 4 Id. 117; Allen v. Poole, 54 Miss. 323; Deason v. Taylor, 53 Id. 697, 701; Wiseman v. Hutchinson, 20 Ind. 40; Croskey v. Chapman, 26 Id. 333; Johnston v. Gwathmey, 4 Litt. (Ky.) 317; Corbitt v. Clenny, 52 Ala. 480, 483;

§ 627. **Nature of the Notice.**—The notice which thus results from recitals and other matters contained in title-deeds, within the operation of the general rule, is absolute in its nature. The party having been put upon an inquiry, the presumption that he obtained a knowledge of *all* the facts which could be ascertained by means of a diligent inquiry prosecuted through the entire chain of title-deeds, and through all the instruments referred to, is conclusive; it can not be rebutted by any evidence of a failure to discover the truth, nor even by proof of ignorance that instruments affecting the title were in existence. This presumption extends to unrecorded documents as well as to those which have been duly recorded.[1]

§ 628. **Extent of the Notice.**—Where under the operation of the foregoing general rule a purchaser has notice of a title-

Dudley v. Witter, 46 Id. 664, 694, 695; Burch v. Carter, 44 Id. 115, 117; Campbell v. Roach, 45 Id. 667; Witter v. Dudley, 42 Id. 616, 621, 625; Newsome v. Collins, 43 Id. 656, 663; Major v. Buckley, 51 Mo. 227, 231; Ridgeway v. Holliday, 59 Id. 444; Willis v. Gay, 48 Tex. 463; Wood v. Krebbs, 30 Gratt. 708; Burwell's Ex'rs v. Fauber, 21 Id. 446; Long v. Weller's Ex'rs, 29 Id. 347; Brush v. Ware, 15 Pet. 93, 114; Mueller v. Engeln, 12 Bush, 441, 444; Stidham v. Matthews, 29 Ark. 650, 659, 660; Pringle v. Dunn, 37 Wisc. 449, 464; Fitzhugh v. Barnard, 12 Mich. 105; Case v. Erwin, 18 Id. 434; Baker v. Mather, 25 Id. 51, 53; Frost v. Beekman, 1 Johns. Ch. 288, 298; Howard Ins. Co. v. Halsey, 8 N. Y. 271; Gibert v. Peteler, 38 Id. 165; Acer v. Westcott, 46 Id. 384; Murrell v. Watson, 1 Tenn. Ch. 342; Rafferty v. Mallory, 3 Biss. 352, 368, 369; Green v. Early, 39 Md. 223, 229; White v. Foster, 102 Mass. 375, 380; Acer v. Westcott, 1 Lans. 193, 197; Sigourney v. Munn, 7 Conn. 324; Christmas v. Mitchell, 3 Ired. Eq. 535; Hagthrop v. Hook's Adm'rs, 1 Gill & J. 270; Kerr v. Kitchen, 5 Harris (17 Pa. St.), 433; Malpas v. Ackland, 3 Russ. 273; Davies v. Thomas, 2 Y. & C. Exch. 234; Greenfield v. Edwards, 2 De G. J. & S. 582; Pilcher v. Rawlins, L. R., 11 Eq. 53; Robson v. Flight, 4 De G. J. & S. 608; Clements v. Welles, L. R., 1 Eq. 200; Wilson v. Hart, Id., 1 Ch. 463. The facts and decisions in a few of the earlier English cases throw much light upon the general rule, its operation and foundation. In Moore v. Bennett, 2 Ch. Cas. 246, and Bacon v. Bacon, Tothill, 133, it was said that where a purchaser can only make out title by a deed which leads him to another fact, he shall not be deemed a purchaser without notice of that fact, but shall be *presumed* cognizant thereof; for it is *crassa negligentia* that he sought not after it. In Bisco v. Earl of Banbury, 1 Ch. Cas. 287, the rule was stated very clearly. A purchaser had actual notice of a certain mortgage. This mortgage deed referred to other incumbrances; and he was held to be charged with constructive notice of these incumbrances thus referred to in the mortgage. The court said: "The purchaser could not be ignorant of the mortgage, and ought to have seen it, and that would have led him to the other deeds, in which, pursued from one to another, the whole case must have been discovered to him." In Coppin v. Fernyhough, 2 Bro. Ch. 291, it was held that a purchaser who has actual notice of one instrument affecting the estate, has constructive notice of all other instruments to which an examination of the first could have led him.

[1] Corbitt v. Clenny, 52 Ala. 480, 483; Stidham v. Matthews, 29 Ark. 650, 659, 660; Howard Ins. Co. v. Halsey, 8 N. Y. 271; 4 Sandf. 565; Johnson v. Thweatt, 18 Ala. 741; Wailes v. Cooper, 24 Miss. 208; Honore's Ex'rs v. Bakewell, 6 B. Mon. 67; Nelson v. Allen, 1 Yerg. 360; and see many of the cases cited in the last preceding note. In fact, all the decisions, either explicitly or implicitly, treat the presumption as conclusive, and the notice as absolute.

deed, he is presumed to know all its contents and is bound thereby. As an illustration, notice of a lease includes in its effects a constructive notice of all its covenants.[1] Furthermore, the necessity of prosecuting the inquiry, and the constructive notice arising therefrom, extend to every instrument forming an essential link in the direct chain of title through which the purchaser holds; that is, to the ultimate source of his title, and to every succeeding deed through which the title must be directly traced, and which is necessary to its establishment. The purchaser is thus charged with notice of every provision in each separate instrument constituting the entire series by which his own interest can be affected, or from which others have derived or may derive any rights.[2] Not only is a purchaser thus charged with a constructive notice of everything material in the deeds which form the direct chain through which his title is deduced, but if any of these conveyances should contain a recital of or reference to another deed otherwise collateral and not a part of the direct series, he would by means of such

[1] Taylor v. Stibbert, 2 Ves. 437; Hall v. Smith, 14 Id. 426; Walter v. Maunde, 1 J. & W. 181; Tanner v. Florence, 1 Ch. Cas. 259; Cosser v. Collinge, 3 My. & K. 282; Pope v. Garland, 4 Y. & C. 394; Martin v. Cotter, 3 Jo. & Lat. 496, 506; Lewis v. Bond, 18 Beav. 85; Wilbraham v. Livesey, 18 Id. 206; Cox v. Coventon, 31 Id. 378; Drysdale v. Mace, 2 Sm. & Gif. 225; Smith v. Capron, 7 Hare, 185; Clements v. Welles, L. R., 1 Eq. 200; 35 Beav. 513. To this rule there is an important limitation. In suits for specific performance of a contract, the vendee will not always be charged with notice of all the covenants contained in a lease of the premises, of which lease he has a general notice. This is especially so where the lease contains unusual covenants seriously affecting the value of the property, and information concerning them has not been given. Lord Chan. Sugden said of such a case: "It is a question of *bona fides*. Where the purchaser has completed his purchase the rule [*i. e.*, the rule stated in the text] is right; but where the purchaser is only bidding for something, and has not been informed of the obligations to which he will be liable in becoming the purchaser, it is always a question of good faith." Martin v. Cotter, 3 Jo. & Lat. 496, 506. In Wilbraham v. Livesey, 18 Beav. 206, Sir John Romilly, M. R., held that while a person who contracts for a lease from another, with knowledge that he holds under a leasehold title, has notice of the ordinary covenants in the original lease, he will not be held to have notice of peculiar and unusual covenants. See also Van v. Corpe, 3 My. & K. 269, 277; Flight v. Barton, 3 Id. 282; Pope v. Garland, 4 Y. & C. 394, 401. The reason of this limitation is, that the remedy of specific performance is somewhat discretionary; or to speak more accurately, it will not be granted unless the position of the plaintiff is perfectly equitable, fair, and just.

[2] See the cases cited *ante* under § 626; also Howard Ins. Co. v. Halsey, 8 N. Y. 271; 4 Sandf. 565; Guion v. Knapp, 6 Paige, 35; Harris v. Fly, 7 Id. 421; Acer v. Westcott, 1 Lans. 193; Jumel v. Jumel, 7 Paige, 591; Briggs v. Palmer, 20 Barb. 392; 20 N. Y. 15; 21 Id. 574; Babcock v. Lisk, 57 Ill. 327; Dargin v. Beeker, 10 Iowa, 571; Hamilton v. Nutt, 34 Conn. 501; McAteer v. McMullen, 2 Barr, 32; Martin v. Nash, 31 Miss. 324; George v. Kent, 7 Allen, 16; Pike v. Goodnow, 12 Id. 472, 474; Brown v. Simons, 44 N. H. 475; Sanborn v. Robinson, 54 Id. 239; and the same is true of parties deriving title from or through public grants or patents. Brush v. Ware, 15 Pet. 93, 111; Bonner v. Ware, 10 Ohio, 465.

recital or reference have notice of this collateral instrument, of all its contents, and of all the facts indicated by it which might be ascertained through an inquiry prosecuted with reasonable diligence.[1] Finally, the notice extends to all deeds and other instruments, properly falling within the two preceding rules, whether they are recorded or unrecorded. In other words, a purchaser is charged with notice of any deed forming a part of his direct chain of title, and of every collateral instrument recited or referred to, as well when it is unrecorded as when it is recorded.[2]

§ 629. **Limitation: Matters Purely Collateral.**—To the general rule defining constructive notice from title papers, and to the subordinate rules contained in the preceding paragraph, there are one or two necessary limitations. In the first place, a purchaser is not charged with constructive notice[3] of abso-

[1] Deason v. Taylor, 53 Miss. 697, 701; George v. Kent, 7 Allen, 16; Judson v. Dada, 79 N. Y. 373, 379; Green v. Slayter, 4 Johns. Ch. 38; Cambridge B'k v. Delano, 48 N. Y. 326; Hope v. Liddell, 21 Beav. 183; Jones v. Smith, 1 Hare, 43; 1 Phil. 244. Deason v. Taylor, *supra*, is a very illustrative case. It holds that a purchaser is not only bound by notice of all recitals in the deed to himself, and of everything stated in the several conveyances which make up his direct chain of title; but he must investigate and explore every collateral matter to which his attention is thus directed. For example, a prior deed in a chain of title recited that the sale to the grantee therein was on credit: Held that a subsequent purchaser was charged with constructive notice of the prior grantor's lien on the premises, and he was bound to ascertain whether that purchase price referred to had been paid or was still unpaid; and the fact that the time of payment as stated in the prior deed had passed, did not excuse or in any way affect the necessity of his making inquiry. The court cited as sustaining the rule thus laid down, Wiseman v. Hutchinson, 20 Ind. 40; Croskey v. Chapman, 26 Ind. 333; Johnston v. Gwathmey, 4 Litt. (Ky.) 317; Honore v. Bakewell, 6 B. Mon. 67; Thornton v. Knox, 6 Id. 74. In Avent v. McCorkle, 45 Miss. 221, it was held that under the same circumstances, a subsequent purchaser may assume the prior purchase price to have been paid, when a sufficient time has elapsed to bar any claim for such price under the statute for limitations. It has also been held that where one executes a deed, release, or other instrument affecting the title to real estate, which contains a reference to some other deed for a more complete description of the premises, or for some other purpose, he thereby becomes charged with notice of the instrument thus referred to, of its contents, and of the facts which it indicates. See Howard Ins. Co. v. Halsey, 8 N. Y. 271; 4 Sandf. 565; Guion v. Knapp, 6 Paige, 35. In Howard Ins. Co. v. Halsey, the rule was certainly carried to its extreme limits.

[2] Stidham v. Matthews, 29 Ark. 650, 659, 660; Baker v. Mather, 25 Mich. 51, 53; White v. Foster, 102 Mass. 375, 380; Howard v. Chase, 104 Id. 249; George v. Kent, 7 Allen, 16; Garrett v. Puckett, 15 Ind. 485; Ross v. Worthington, 11 Minn. 438; Price v. McDonald, 1 Md. 403; Hudson v. Warner, 2 Har. & G. 415. In Baker v. Mather, a second mortgagee had constructive notice of a prior unrecorded mortgage expressly mentioned in and excepted from the deed to his mortgager, although this deed itself was also unrecorded. In White v. Foster, a deed referred to a mortgage of the land by the grantor, which was on record, and which reserved "all the trees growing on the land, the same having been sold to A." Held that the grantee thereby had notice of A.'s title as a valid title, although A.'s deed of the trees was not recorded.

[3] Of course he may have *actual* notice of any and every matter so stated, if it can be proved that he actually

lutely every matter or fact stated in the instruments forming his direct chain of title, or in a collateral instrument connected with the direct series by reference or recital. The rules do not extend to, and he is not constructively bound by, a recital in any deed or other title paper of matter which is wholly foreign to the nature and objects of the instrument. In other words, he has no constructive notice of any matter contained in a recital, which does not affect his own interest in the property held under or through the conveyance, or from which other persons do not derive any rights in such property; he is not charged with notice of any fact wholly collateral and foreign to the objects and effects of the instrument as a conveyance of an estate or interest to himself.[1] In the second place, the rules do not extend to any recital or statement contained in an instrument which is purely collateral, and deals with another subject-matter, and which is not connected with the direct series of title-deeds by reference, although such collateral instrument may have been executed between the same parties. The purchaser is not charged with constructive notice of such a recital or statement.[2]

§ 630. **Particular Instances.**—The constructive notice arises not only from recitals, references, and other similar statements of fact, but also from the character and description of the parties to a deed or other instrument of title. A purchaser may thus be charged with notice of the rights held by third persons from the fact that they are joined as parties to a conveyance, or from the character or description of them appearing in the instrument as married women, trustees, administrators, executors, and the like.[3] The immediate parties, grantor and

saw and read the provision containing the statement. Example of no such notice, see Sleeper v. Chapman, 121 Mass. 404.

[1] Mueller v. Engeln, 12 Bush, 441, 444; Burch v. Carter, 44 Ala. 115, 117. Mueller v. Engeln admirably illustrates this limitation. A purchaser held under a deed of land. It was held that he had no constructive notice of a clause in such deed which purported to be a bill of sale of certain chattels from the grantor, and attempted to reserve a lien thereon in favor of the grantor.

[2] Boggs v. Varner, 6 Watts & Serg. 469; Burch v. Carter, 44 Ala. 115, 117; Sleeper v. Chapman, 121 Mass. 404 (clause in a chattel mortgage).

[3] As illustrations: A grantee by a deed in which the grantor is described as an administrator and conveys as such, has constructive notice of the trust and of all rights under it, and obtains no title as against the heirs to whom the land had descended, Rafferty v. Mallory, 3 Biss. 362, 368, 369; a married woman being a party is notice of her interest, Steedman v. Poole, 6 Hare, 193; the fact that persons uniting as parties are described as devisees may be notice of their rights, Burgoyne v. Hatton, Barnard. Ch. R. 237; and see Attorney-general v. Hall, 16 Beav. 388. A purchaser by a deed from a grantor who is a trustee, whose only title is that of a trustee, may have notice of the trust, and will certainly have such notice if the grantor executes the deed in his

grantee, mortgagor and mortgagee, by whom and to whom the instrument is directly executed, have, of course, a notice of everything which it contains. The notice is then really an *actual* one rather than constructive; for the immediate parties are assumed to have read their own conveyance, and to have become acquainted with all of its contents.[1]

§ 631. **When the Notice Arises.**—The doctrine of constructive notice from title-deeds applies only to instruments actually in existence; it does not extend to deeds which may be executed in the future, and which may possibly affect the subject-matter. A purchaser is therefore not charged with constructive notice of the contents of a deed which is merely in contemplation or which may by possibility be executed, even though it should afterwards become operative.[2] In applying the general doctrine, it is also settled by the English courts, that where a person receives actual notice of a deed, and this notice is at the same time accompanied by an erroneous statement as to its contents, under such circumstances that he may reasonably rely upon the information, he is not thereby charged with a constructive notice of the real contents.[3] A recital, ref-

character as trustee. See Sergeant v. Ingersoll, 7 Barr, 340; 3 Harris (15 Pa. St.), 343, 348; Dudley v. Witter, 46 Ala. 664, 694; Johnson v. Thweatt, 18 Id. 741; Witter v. Dudley, 42 Id. 616, 621, 625; Coy v. Coy, 15 Minn. 119. A grantee from one of two joint owners has constructive notice of the interest held by the other joint owner. Campbell v. Roach, 45 Ala. 667. A grantee from one who holds only under a land contract has notice of his own grantor's interest, and of the rights held by the vendor in the contract. Newsome v. Collins, 43 Ala. 656, 663.

[1] For example: Where a deed of land described it as incumbered by a mortgage, the grantee would have actual notice of such incumbrance. Guion v. Knapp, 6 Paige, 35; Bellas v. Lloyd, 2 Watts, 401; Kerr v. Kitchen, 5 Harris (17 Pa. St.), 433; Knouff v. Thompson, 4 Id. (16 Pa. St.) 357, 364; Hackwith v. Damrore, 1 Mon. 235. For instances in which a grantee has notice of his grantor's title as trustee, or as a joint owner, or as a vendee, under the deed of conveyance executed between them, see Sergeant v. Ingersoll, 7 Barr, 340; 3 Harris (15 Pa. St.), 343, 348; Dudley v. Witter, 46 Ala. 664, 694; Witter v. Dudley, 42 Id. 616, 621, 625; Johnson v. Thweatt, 18 Id. 741; Campbell v. Roach, 45 Id. 667; Newsome v. Collins, 43 Id. 656, 663.

[2] Cothay v. Sydenham, 2 Bro. Ch. 391. A purchaser was informed that a draft of a deed had been prepared, but not that it was executed. He was held not to be charged with notice of the instrument as a deed, although it had in fact been executed. Lord Thurlow stated the rule in such cases as follows: "If the notice had been of a deed actually executed, it certainly would do; but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise; there is no case nor reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation."

[3] Jones v. Smith, 1 Hare, 43, 60–70, *per* Wigram, V. C. The opinion in this case is very instructive. Allen v. Knight, 5 Hare, 272; Bird v. Fox, 11 Id. 40; Harryman v. Collins, 18 Beav. 11; Ware v. Lord Egmont, 4 De G. M. & G. 460, 473; and see cases cited *ante* in note under § 616.

It has been held in some American decisions that the grantee by a quit-claim deed is charged with notice of any defects in the title, and can not be a purchaser without notice. See Ridgeway v. Holliday, 59 Mo. 444; Smith v. Dunton; 42 Iowa, 48; Wat-

erence, or other statement in a title-deed, in order to operate as notice, must be so definite and distinct that it conveys some information to the party, or else arouses his attention by directing him to the source of information. A statement may be so vague and uncertain in its terms that it will not put a purchaser upon an inquiry, and will not therefore affect his conscience with notice.[1] Finally, the notice arising from title-deeds, like every other instance or kind of constructive notice, does not operate between the immediate parties to a conveyance, the grantor and grantee, mortgagor and mortgagee, but only between a purchaser, grantee, or mortgagee, and some prior party holding or claiming to hold an adverse right, interest, or title.[2]

§ 632. **By Lis Pendens, Rationale of the Doctrine.**—It has been stated in numerous judicial opinions, and the same view has been repeated by text-writers, that the rule concerning the effect of *lis pendens* is wholly referable to the general doctrine of constructive notice. It has been said that a pending suit in equity operates as a constructive notice to the world; and that a purchaser *pendente lite* is bound by the final result of the litigation, because he is charged with such a notice of the proceeding, entirely irrespective of any information which he may or may not have had. Courts of the highest ability and authority have, however, adopted a somewhat different theory. According to this view, "it is not correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who

son v. Phelps, 40 Id. 482; but see *post*, § 753, note.

[1] White v. Carpenter, 2 Paige, 217, *per* Walworth, Chan: "The recital must be such as to explain itself by its own terms, or refer to some deed or circumstance which explains it, or leads to its explanation." See Bell v. Twilight, 22 N. H. 500; Kaine v. Denniston, 10 Harris (22 Pa. St.), 202; French v. The Loyal Co., 5 Leigh, 627.

[2] Champlin v. Laytin, 6 Paige, 189, 203.

had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence."[1] It must not be supposed that this mode of explanation affects in the slightest degree the settled rules concerning *lis pendens*, or alters the rights and liabilities of alienees from a party to a suit during its pendency; it may, however, prevent the extension of the doctrine, and restrict its further application to particular persons and conditions of fact.

§ 633. **The General Rule.**—If we accept this *rationale* of the doctrine as correct, the general rule may be accurately formulated as follows: During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute, so as to affect the rights of his opponent. This brief proposition in reality contains the entire doctrine. Adopting, however, the ordinary mode of explanation, which regards the effect of *lis pendens* as merely a particular instance of constructive notice, "the general and established rule is," using the language carefully chosen by Chancellor Kent in a leading case, "that a *lis pendens*—a pending suit in equity—duly prosecuted, and not collusive, is notice to a purchaser of the property in

[1] Bellamy v. Sabine, 1 De G. & J. 566, 578, 584. In this most carefully considered case the theory given in the text was fully adopted and made the basis of decision by the court of appeal in chancery. Lord Chan. Cranworth, after using the language which I have quoted in the text, proceeded as follows (p. 579): "That this is the true doctrine as to *lis pendens* appears to me to be not only founded on principle, but also consistent with the authorities." [He cites Culpepper v. Aston, 2 Ch. Cas. 115, 221; Sorrell v. Carpenter, 2 P. Wms. 482, and adds:] "In both these cases the doctrine really was, that, pending a litigation, the defendant can not by alienation affect the rights of the plaintiff to the property in dispute; and the same principle is applicable against a plaintiff, so as to prevent him from alienating to the prejudice of the defendant where, from the nature of the suit, he may have in the result a right against the plaintiff; as on a bill by a devisee to establish a will against an heir, if in the result the devise is declared void, the heir is not to be prejudiced by an alienation of the devisee (plaintiff) *pendente lite*. (See Garth v. Ward, 2 Atk. 174.) The language of the court in these cases, as well as in Worsley v. Earl of Scarborough, 3 Atk. 392, certainly is to the effect that *lis pendens* is implied notice to all the world. I confess I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent." The Lord Justice Turner gives the same *rationale* of the doctrine. He says (p. 584): "The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is, as I think, a doctrine common to the courts both of law and of equity, and rests, as I apprehend, upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination, if alientions *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding. That this doctrine belongs to a court of law no less than to courts of equity appears from a passage in the 2 Institute, 375, by Lord Coke." Knight-Bruce, L. J., concurred in these opinions.

dispute from a party to the litigation, so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed."[1] Wherever, therefore, an equitable suit affecting the title to a particular estate as its subject-matter, has been begun by service of process, and is prosecuted in good faith, whether we say that the *lis pendens* is constructive notice to all the world, or regard the doctrine as necessarily resting upon a basis of expediency, the result is the same; an alienee of the subject-matter from either party during the pendency of the suit, takes it subject to the rights of the other party involved in the controversy, and is bound by the decree or judgment finally rendered. In the great majority of ordinary litigations the rule has naturally been applied to an alienee of the defendant; but it is also extended, wherever the nature and object of the suit require, to one who derives title from the plaintiff. The same *principle* embraces actions at law as well as suits in equity; but, from the essential nature of legal titles, it need not ordinarily be invoked at law. In all actions at law to which the doctrine could apply, as, for

[1] The following *résumé* of the doctrine is given in the recent case of Allen v. Poole, 54 Miss. 323, 333, by Simrall, C. J.: "Was Allen a purchaser *pendente lite*, and if so what are the consequences? A *lis pendens* begins from the service of the subpœna, and not from the filing the bill or issuance of the writ. Allen v. Mandaville, 26 Miss. 397, 399; Murray v. Ballou, 1 Johns. Ch. 566, 576; 2 Sugden on Vendors (7th Am. ed.), 544. If a person purchases an estate, pending a suit involving a question of title to it, he will be considered a purchaser with notice, although he was not a party to the suit. Newland on Cont. 506. The *lis pendens* continues until the final disposition of the suit. Sugd. on Vend. 281, 285. A bill to foreclose a mortgage on the premises is a suit involving the title within the rule. Choudron v. Magee, 8 Ala. 570. Equally so must be a suit asserting the vendor's lien. *Lis pendens* is in law notice of every fact averred in the pleadings pertinent to the matter in issue or the relief sought, and of the contents of exhibits filed and proved. Center v. The Bank, 22 Ala. 743, 757. But in order that the notice may attach, the property involved in the suit must be so pointed out in the proceedings as to warn the public that they intermeddle at their peril. Miller v. Sherry, 2 Wall. 237; Green v. Slayter, 4 Johns. Ch. 38; Sugd. on Vend. 344. At the time Allen bought the property from Scott, the solicitor and agent of Brooks & Co., Emily Poole had filed her bill, and had obtained service of a summons upon Scott. There was a *lis pendens*, and he was chargeable with notice of the character and extent of Mrs. Poole's claim on the land, of everything which the pleadings and exhibits set forth. The technical notice arising from *lis pendens* has its foundation in necessity; 'for it would be impossible for any suit to be brought to a successful termination if alienations pending the suit could prevail.'" It will be observed that in this last sentence the learned judge quotes the very language of Turner, L. J., in Bellamy v. Sabine, cited under the preceding paragraph, and thereby adopts the theory sanctioned by that case. In Center v. The Bank, 22 Ala. 743, 757, it was said: "*Lis pendens*, which in a chancery suit begins with the filing of the bill and service of subpœna, and continues until the final orders are taken in the case, is notice of every fact contained in the pleadings which is pertinent to the issue, and of the contents of exhibits to the bill which are produced and proved." The leading American cases by which the general rule, originally

example, in actions of ejectment, if the plaintiff recovers a judgment against the defendant, he has also a perfect title against any alienee of the defendant, since he must necessarily recover upon the strength of his own legal title; in other words, the defendant can never give to an assignee or alienee a better title against the plaintiff than that which he himself holds.[1] It is otherwise in many equitable suits. Where the plaintiff in equity has only an equitable title or right to the property in dispute, it might be possible for the defendant to transfer the subject-matter to a *bona fide* purchaser, and thus to clothe such transferee with a title overriding the equity of the plaintiff. The doctrine of constructive notice by *lis pendens* is therefore an essential incident of many equitable suits, in order to prevent a failure of justice. It naturally came to be regarded as peculiar to proceedings in courts of equity; although the same *principle* would operate, if necessary, at law. This analysis and description, it should be observed, are entirely independent of any statutory modifications which have been made in some of the states and in England

established by the English court of chancery, was adopted, were Murray v. Ballou, 1 Johns. Ch. 566; Murray v. Lylburn, 2 Id. 441; Murray v. Finster, 2 Id. 155, all decided by Chancellor Kent. See, also, as sustaining the doctrine stated in the text: Real Estate Sav. Inst. v. Collonious, 63 Mo. 290, 294; Turner v. Babb, 60 Id. 342; O'Reilly v. Nicholson, 45 Id. 160; Blanchard v. Ware, 43 Iowa, 530, 531; 37 Id. 305, 307; Holman v. Patterson's Heirs, 29 Ark. 357; Brundage v. Biggs, 25 Ohio St. 652; Seabrook v. Brady, 47 Ga. 650; Douglass v. McCrackin, 52 Id. 596; Tharpe v. Dunlap, 4 Heisk. 674, 686; Salisbury v. Morss, 7 Lans. 359, 365, 366; Cook v. Mancius, 5 Johns. Ch. 89, 93; Sedgwick v. Cleveland, 7 Paige, 287; Van Hook v. Throckmorton, 8 Id. 33; White v. Carpenter, 2 Id. 217, 252; Hayden v. Bucklin, 9 Id. 512, 514; Jackson v. Losee, 4 Sandf. Ch. 381; Jackson v. Andrews, 7 Wend. 152, 156; Parks v. Jackson, 11 Id. 442, 451, 457; Hopkins v. McLaren, 4 Cow. 667; Griffith v. Griffith, 1 Hoff. Ch. 153; Leitch v. Wells, 48 Barb. 637; 48 N. Y. 585; Chapman v. West, 17 Id. 125; Patterson v. Brown, 32 Id. 81; Mitchell v. Smith, 53 Id. 413; Ayrault v. Murphy, 54 Id. 203; Harrington v. Slade, 22 Barb. 161; Pratt v. Hoag, 5 Duer, 631; Norton v. Birge, 35 Conn. 250; Borrowscale v. Tuttle, 5 Allen, 377; Haven v. Adams, 8 Id. 363, 367, per Chapman, J.; Beeckman v. Montgomery, 1 McCarter, 106; McPherson v. Housel, 2 Beasley, 299; Hersey v. Turbett, 3 Casey (27 Pa. St.), 418; Boulden v. Lanahan, 29 Md. 200; Inloes' Lessee v. Harvey, 11 Id. 519; Tongue v. Morton, 6 Har. & J. 21; Edwards v. Banksmith, 35 Ga. 213; Brandon v. Cabiness, 10 Ala. 155; Choudron v. Magee, 8 Id. 570; Hoole v. Att'y-Gen., 22 Id. 190; Ashley v. Cunningham, 16 Ark. 168; Whiting v. Beebe, 7 Eng. 421, 564; Gossom v. Donaldson, 18 B. Mon. 230; Owings v. Myers, 3 Bibb, 278; Roberts v. Fleming, 53 Ill. 196, 198; Jackson v. Warren, 32 Id. 331; Gilman v. Hamilton, 16 Id. 225; Kern v. Hazlerigg, 11 Ind. 443; Truitt v. Truitt, 38 Id. 16; Green v. White, 7 Blackf. 242; McGregor v. McGregor, 21 Iowa, 441; Knowles v. Rablin, 20 Id. 101; Loomis v. Riley, 24 Ill. 307; Cooley v. Brayton, 16 Id. 10; Culpepper v. Aston, 2 Ch. Cas. 115, 221; Preston v. Tubbin, 1 Vern. 286; Sorrell v. Carpenter, 2 P. Wms. 482; Garth v. Ward, 2 Atk. 174; Worsley v. Earl of Scarborough, 3 Id. 392; Higgins v. Shaw, 2 Dr. & War. 356; Tredway v. McDonald, 51 Iowa, 663.

[1] Sheridan v. Andrews, 49 N. Y. 478.

§ 634. **Requisites of the Lis Pendens.**—Having thus explained the general rule and the reasons upon which it rests, I shall very briefly state those incidents of the pending suit which must exist in order that the rule may operate and its effects may be produced upon an alienee. The *lis pendens* and the consequent notice, to use the language ordinarily employed, only begin from the service of a subpœna or other process after the filing of the bill, so that the court may have acquired jurisdiction of the defendant.[1] The effect of the suit as notice continues through the entire time of its pendency, and ends when the suit is really ended by a final judgment.[2] In order, however, that a purchaser *pendente lite* may be thus affected, the suit must be prosecuted in good faith, with all reasonable diligence, and without unnecessary delay. A neglect to comply with this requisite would relieve a purchaser from the effect of the *lis pendens* as notice.[3] The question of reasonable diligence in prosecuting the suit must, however, depend upon the circumstances of each case. Thus, the abatement of the suit by the death of a party will not destroy its effect as *lis pendens*, provided it is revived without unnecessary delay.[4] Even a judgment in favor of the defendant does not necessarily at once terminate the *lis pendens*. If the unsuccessful party is entitled to appeal, the constructive notice continues during a reasonable time for an appeal to be taken.[5] The effect of *lis pendens* upon the rights of an alienee depends not only upon this element of time, but also upon the averments of the pleadings. Proper and specific allegations are a necessary requisite. *Lis pendens* is notice of everything averred in the pleadings pertinent to the issue or to

[1] Allen v. Poole, 54 Miss. 323, 333; Allen v. Mandaville, 26 Id. 397, 399; Center v. The Bank, 22 Ala. 743; Farmers Nat. B'k v. Fletcher, 44 Iowa, 252; Murray v. Ballou, 1 Johns. Ch. 566, 576; Hayden v. Bucklin, 9 Paige, 512; Leitch v. Wells, 48 N. Y. 585; but see King v. Bell, 28 Conn. 593; Norton v. Burge, 35 Id. 250, 280; Dresser v. Wood, 15 Kans. 344; Haughwout v. Murphy, 21 N. J. Eq. (6 C. E. Green), 118; Weeks v. Tomes, 16 Hun. 349.

[2] Ibid; Turner v. Crebill, 1 Ohio, 372; and see Lee Co. v. Rogers, 7 Wall. 181; Jackson v. Warren, 32 Ill. 331; Winborn v. Gorrell, 3 Ired. Eq. 117; Page v. Waring, 76 N. Y. 463.

[3] Murray v. Ballou, 1 Johns. Ch. 566, *per* Ch. Kent; Herrington v. McCollum, 73 Ill. 476; Petree v. Bell, 2 Bush, 58; Clarkson v. Morgan, 6 B. Mon. 441, 448; Watson v. Wilson, 2 Dana, 406; Price v. McDonald, 1 Md. 403, 412; Gibler v. Trimble, 14 Ohio, 323; Trimble v. Boothby, 14 Id. 109.

[4] Ashley v. Cunningham, 16 Ark. 168; Debell v. Foxworthy, 9 B. Mon. 228; Watson v. Wilson, 2 Dana, 406. In the last-named case the effect of a death, and the necessity of a revivor without delay, are fully and carefully examined by the court. And see also Herrington v. McCollum, 73 Ill. 476.

[5] When an appeal is thus taken without delay, the *lis pendens* is of course prolonged until the final decision. Debell v. Foxworthy, 9 B. Mon. 228; Gilman v. Hamilton, 16 Ill. 225.

the relief sought, and of the contents of exhibits filed and proved.[1] In order that the notice may thus operate, the specific property to which the suit relates, must be pointed out in the pleadings in such a manner as to call the attention of all persons to the very thing, and warn them not to intermeddle. It is not necessary that the land should be described by metes and bounds; certainty to a common intent, reasonable certainty, is sufficient. The specific subject-matter should be so described and identified, that no one, upon reading the allegations, could have a reasonable doubt as to what was intended. The averments of the bill "must be so definite, that any one on reading it can learn what property was intended to be made the subject of litigation."[2] The notice arising from a pending suit does not affect property not embraced within the descriptions of the pleading; nor does its operation extend beyond the prayer for relief.[3] I would remark in passing, that while the general doctrine of notice by *lis pendens* and the foregoing special rules have ordinarily been applied to real property described by the plaintiff in his bill of complaint, they should, upon principle, apply with equal force to the "counter-claims" and "cross-complaints" authorized by the Reformed Procedure, by which the defendant alleges some equitable interest or right, and demands some affirmative equitable relief. In such pleadings the defendant becomes the *actor*, and is to all intents and purposes a plaintiff.

§ 635. **To what Kinds of Suits the Rule Extends: Suits concerning Land.**—It may be stated as a general proposition that the doctrine of notice by *lis pendens* extends to all equitable suits which involve the title to a specific tract of land, or which are brought to establish any equitable estate, interest, or right in an identified parcel of land, or to enforce any lien, charge, or incumbrance upon land. Among the most familiar instances in which the rule applies are suits to foreclose mortgages, to enforce vendor's liens, to establish trusts, and the like.[4]

[1] Allen v. Poole. 54 Miss. 323, 333; Center v. The Bank, 22 Ala. 743, 757.

[2] Allen v. Poole, 54 Miss. 323, 333; Miller v. Sherry, 2 Wall. 237; Green v. Slayter, 4 Johns. Ch. 38; Griffith v. Griffith, 9 Paige, 315, 317; 1 Hoff. Ch. 153; Low v. Pratt, 53 Ill. 438; Lewis v. Madisons, 1 Munf. 303. See Brown v. Goodwin, 75 N. Y. 409; Jones v. McNarrin, 68 Me. 334; Jaffray v. Brown, 17 Hun, 575.

[3] Ibid. See Chapman v. West, 17 N. Y. 125, for peculiar circumstances in which the notice extends to a portion of the premises not directly embraced within the objects of the suit. Drake v. Crowell, 40 N. J. L. 58.

[4] Allen v. Poole, 54 Miss. 323, 333; Choudron v. Magee, 8 Ala. 570; Real Estate Sav. Inst. v. Collonious, 63 Mo. 290, 294 (suit to set aside a partition sale on account of fraud); Blanchard v. Ware, 43 Iowa, 530, 531; 37 Id. 305, 307 (suit to specially perform a contract for sale of land [illegible] conce[illegible]

§ 636. **Suits concerning Personal Property.**—While the doctrine in general applies to all equitable suits in which the subject-matter is land or any estate or interest therein, the proposition is equally true and general that it does not extend to ordinary suits concerning personal property, goods and chattels, securities or money. The reason for this restriction is obvious; there is no necessity for invoking the rule in such litigations, under all ordinary circumstances. The decisions have, however, admitted an exception to this general proposition in one class of suits. Actions brought to enforce a trust extending over personal property, goods, and securities not negotiable in their nature, are held to be within the operation of the rule. A purchaser of such trust property from the trustee, during the pendency of the action, is charged with constructive notice, and his purchase is invalid as against the plaintiff whose rights are established by the final decree.[1] It is well settled that the

Biggs, 25 Ohio St. 652, 656 (equitable interest in the land set up by the defendant in a "counter-claim" or cross-complaint); Seabrook v. Brady, 47 Ga. 650 (suit to enforce a charge on land); Tharpe v. Dunlap, 4 Heisk. 674, 686 (suit involving the title to land); Salisbury v. Morss, 7 Lans. 359, 365 (suit to enforce a charge created by will on land devised); Edwards v. Banksmith, 35 Ga. 213; Knowles v. Rablin, 20 Iowa, 101; Wickliffe v. Breckinridge, 1 Bush, 427; Bayer v. Cockerill, 3 Kans. 282; Horn v. Jones, 28 Cal. 194; Cockrill v. Maney, 2 Tenn. Ch. 49; Watson v. Wilcox, 39 Wisc. 643; Truitt v. Truitt, 38 Ind. 16. The action of ejectment, by which an equitable interest was enforced under the peculiar practice prevailing in Pennsylvania, operated as notice within the principle of the rules. Bollin v. Connelly, 73 Pa. St. (23 P. F. Sm.) 336; Hersey v. Turbett, 3 Casey, 418; Hill v. Oliphant, 5 Wright, 364. A suit to forclose an unrecorded mortgage may thus operate as a notice of the mortgage to subsequent purchasers in place of an actual recording. Center v. The Bank, 22 Ala. 743; Chapman v. West, 17 N. Y. 125; but not, perhaps, where a statute requires an *actual* notice of the prior unrecorded mortgage. McCutchen v. Miller, 31 Miss. 65; Newman v. Chapman, 2 Rand. 93.

[1] Murray v. Lylburn, 2 Johns. Ch. 441; Leitch v. Wells, 48 Barb. 637; 48 N. Y. 585; Scudder v. Van Amburgh, 4 Edw. Ch. 29; Diamond v. The Lawrence Co. Bk., 1 Wright, 353; Bolling v. Carter, 9 Ala. 921; Shelton v. Johnson, 4 Sneed, 672. This exception has, however, been admitted by the courts with great caution, and within narrow limits, so as not to interfere with that freedom of transfer and certainty of title required by the interests of mercantile and commercial business. It has never been extended to securities or other personal property which are negotiable or even semi-negotiable in the transactions of commerce. The leading case is Murray v. Lylburn, *supra*. A bill had been filed against one Winter, who held land as trustee for the plaintiff, charging a breach of trust; and an injunction was issued restraining W. from disposing of such trust property, or proceeds thereof. Pending this suit W. sold and conveyed a parcel of the trust land, and took back a bond and mortgage for the price. These securities he assigned to Lylburn, who paid value for them and had no actual notice of the pending suit against W. The plaintiff thereupon filed this supplemental bill against L. and W. to reach the bond and mortgage so transferred. Chan. Kent, after saying that the plaintiff's right to relief against L. depended entirely upon the former suit being constructive notice to L., proceeded: "The object of that suit was to take the whole subject of the trust out of W.'s hands, together with all the papers and securities relating thereto. If W. had held a number of mortgages and other

doctrine of constructive notice from *lis pendens* does not embrace suits concerning negotiable instruments or moneys, so as to affect the title of a transferee for value and in good faith during the pendency of the action, even when the transfer was made in direct violation of an injunction, so that the indorser or assignor would be punishable for the contempt.[1]

§ 637. **What Persons are Affected by the Notice.**—Assuming that all the foregoing requisites exist, the constructive notice by the pendency of the suit extends only to those who derive title *from a party or privy pendente lite.* A purchaser of the very land described in the pleadings from one who is not a party to the suit, or a privy to such party, is never chargeable with the constructive notice.[2] If, however, a person has ac-

securities in trust, when the suit was commenced, it would not be pretended that he might safely defeat the object of the suit and the justice of the court, by selling these securities. If he possessed cash, as proceeds of the trust estate, or negotiable paper not due, *or perhaps movable personal property, such as horses, cattle, grain, etc.*, I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealings would require a limitation of the rule; but bonds and mortgages are not the subjects of ordinary commerce, and they formed one of the specific subjects of the suit against W. If the trustee, pending the suit, changed the land into personal security, I see no good reason why the *cestui que trust* should not be at liberty to affirm the sale, and take the security; and whoever afterwards purchased it, was chargeable with notice of the suit." In Leitch v. Wells, 48 Barb. 637, the supreme court of New York applied the same rule to a purchaser of stocks during the pendency of a similar suit; but this decision was reversed on appeal. S. C., 48 N. Y. 585. The court of appeals did not *decide*, however, that the rule can not apply to stocks. The rule seems also to have been held applicable, by Judge Story, to a suit brought for the settlement of partnership affairs, and to enforce the partner's lien upon property of the firm. Hoxie v. Carr, 1 Sumner, 173; Dresser v. Wood, 15 Kans. 344.

[1] The evident reasons for this distinction are based upon the exigencies of commerce, and the familiar doctrines respecting negotiable paper. Murray v. Lylburn, 2 Johns. Ch. 441, *per* Ch. Kent; Leitch v. Wells, 48 N. Y. 585; Stone v. Elliott, 11 Ohio St. 252, 260; Winston v. Westfeldt, 22 Ala. 760; Kieffer v. Ehler, 6 Harris (18 Pa. St.), 388, 391; Hibernian B'k v. Everman, 52 Miss. 500; Mayberry v. Morris, 62 Ala. 113. As to the effect of a "creditor's suit," and how far it operates a notice to a purchaser, *pendente lite*, of property which it claims to reach by means of an equitable lien, see McDermutt v. Strong, 4 Johns. Ch. 687; Hadden v. Spader, 20 Johns. 554; Weed v. Pierce, 9 Cow. 722; Edmeston v. Lyde, 1 Paige, 637; Corning v. White, 2 Id. 567; Farnham v. Campbell, 10 Id. 598; Miller v. Sherry, 2 Wall. 237; U. S. Bank v. Burke, 4 Blackf. 141; Norton v. Birge, 35 Conn. 250; Watson v. Wilson, 2 Dana, 406; Blake v. Bigelow, 5 Ga. 437; McCutchen v. Miller, 31 Miss. 65.

[2] Miller v. Sherry, 2 Wall. 237; Stuyvesant v. Hone, 1 Sandf. Ch. 419; Stuyvesant v. Hone, 2 Barb. Ch. 151; Parks v. Jackson, 11 Wend. 442; French v. The Loyal Co., 5 Leigh, 627; Clarkson v. Morgan, 6 B. Mon. 441; Scarlet v. Gorham, 28 Ill. 319; Parsons v. Hoyt, 24 Iowa, 154; Herrington v. Herrington, 27 Mo. 560. In Miller v. Sherry, *supra*, Swayne, J., said: "Another reason why the bill could not operate as constructive notice, Williams, who held the legal title, was not a party. We apprehend that to affect a person as a purchaser *pendente lite*, it is necessary to show that the holder of the legal title was impleaded before the purchase which is to be set aside." In Brundage v. Biggs, 25 Ohio St. 652, 656, the defendant, by a cross-complaint, set

quired a prior right to the specific land, the commencement of a suit affecting the same land will not invalidate any act which he may subsequently do in pursuance of such antecedent right, or for the purpose of carrying it into effect.[1]

§ 638. **To a Purchaser from Either Litigant Party.**— The question yet remains whether the rule of constructive notice applies to a purchaser *pendente lite* from either party to the litigation. The principle upon which the doctrine is based, and all the reasons of policy by which it is supported, clearly extend alike to both the litigants. In the great majority of instances, it has undoubtedly been a purchaser from the defendant who has been charged with the constructive notice. The plaintiff, however, is equally prevented from alienating the subject-matter of the controversy, to the prejudice of the defendant, wherever, from the nature of the suit, he might have in the result, by the final decree, a right established as against the plaintiff.[2] Finally, is a purchaser from one defendant *pendente lite* affected by the right of another defendant in the same suit? This special question has, upon careful consideration, been answered in the negative. It has been held that where a person without actual notice of a suit, purchases from one of the defendants property which is the subject of it, he is not, in consequence of the pendency of the suit, affected by an equitable title of another defendant which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary for any purposes of the suit to give effect.[3]

up an equitable interest in the land, the legal title to which was in the plaintiff 's wife. She was made a party in this cross-complaint, and applied by her attorney, and obtained leave from the court to answer. The husband and wife, *pendente lite*, united in a conveyance of the land to A., who paid value, and had no actual notice of the suit. *Held*, that the wife was a party; that A. was a purchaser from a party, and had constructive notice and was bound by the result of the suit. Fuller v. Scribner, 76 N. Y. 190, holds that the notice binds a subsequent judgment-creditor of a party, whose judgment would otherwise be an incumbrance.

[1] Farmers' Nat. B'k v. Fletcher, 44 Iowa, 252; Stuyvesant v. Hone, 1 Sandf. Ch. 419; 2 Barb. Ch. 151; Parks v. Jackson, 11 Wend. 442; Clarkson v. Morgan, 6 B. Mon. 441; Trimble v. Boothby, 14 Ohio, 109; Gibler v. Trimble, 14 Id. 323. For example, the bringing a suit against A. as the owner of land, is not notice to B., a prior vendee from A., who is in actual possession, and will not prevent him from subsequently taking the necessary steps to complete the purchase and obtain a deed of conveyance.

[2] For example, in a suit brought by a devisee against the heirs, to establish a will, the final decree might declare the devise void and establish the title of the defendant. Plainly, in such a case, the plaintiff can not alienate the land *pendente lite*, and thus cut off the defendant's possible ultimate rights. Garth v. Ward, 2 Atk. 174; Bellamy v. Sabine, 1 De G. & J. 566, 580, *per* Lord Cranworth.

[3] Bellamy v. Sabine, 1 De G. and J. 566. The full court of appeal in chancery, Lord Chan. Cranworth, and Lord Justices Knight-Bruce and Turner, held that the case did not come either within the principle of the rule, nor within the authorities.

§ 639. **The Statutory Notice of Lis Pendens.**—The general rule concerning constructive notice by *lis pendens*, although firmly settled, has always been regarded by the courts as a very harsh one in its application to *bona fide* purchasers for value; it has only been tolerated from the supposed necessity. It has not been a favorite with courts of equity, and has never been enlarged in its operation beyond its well-settled limits.[1] These considerations have led the English Parliament and the legislatures of many states to interfere, and to create most important statutory modifications and restrictions. It should be observed that wherever the terms of these statutes, and the alterations made by them, apply only to suits concerning real estate, which is true in much of the state legislation—the rule as to suits concerning personal property remains unchanged, the same as at the common law.[2]

§ 640. **Modern Statutory Provisions.**—By the English statute a pending suit will not affect a purchaser for value and without express notice, unless a notice of *lis pendens* has been properly registered in compliance with the statutory directions.[3] One quite general type of the American statutes enacts that in every suit relating to or affecting real estate the plaintiff may at the time of commencing the action, or afterwards prior to final judgment, file or procure to be recorded in the clerk's or recorder's office of the county in which the land is situated, a written notice describing the lands affected, and the general nature of the action; and that no suit concerning real estate shall be notice to a purchaser *pendente lite* for value and without actual notice unless and until such a notice of *lis pendens* has been thus filed or recorded.[4] The terms of these statutes apply

[1] See Leitch v. Wells, 48 N. Y. 585, 609, *per* Earl, J.; Hayden v. Bucklin, 9 Paige, 512, *per* Walworth, Ch.

[2] Leitch v. Wells, 48 N. Y. 585, 602, *per* Hunt, J. Speaking of the statute in New York, the learned judge says: "This relaxation of a rigorous rule applies to real estate only, and, as to personal property, the rule remains as at the common law."

[3] Stat. of 2 and 3 Vict. ch. 11, § 7.

[4] *New York.*—Code of Proc., § 132 (old code); Code of Civ. Proc. (new code), Bliss' ed., v. 2, p. 104, § 1670.

California.—Code of Civ. Proc. (1880), p. 142, § 409.

Connecticut.—Rev. Stat. (1875), p. 402, § 4.

Illinois.—Rev. Stat. (1880), p. 149, § 9.

Iowa.—Rev. Code (1880), v. 2, p. 664, §§ 2628, 2629.

Michigan.—Comp. Laws (1871), v. 2, p. 1535, § 29, p. 1805, § 10.

Minnesota.—Gen. Stat. (1878), p. 819, § 34.

Missouri.—Code of Proc., Winslow's ed. (1879), p. 103, § 420.

Nevada.—Stat. (1869), p. 215, § 128.

New Jersey.—Rev. (1877), p. 49, § 43.

North Carolina.—Code of Civ. Proc. (1868), p. 36, § 90.

Ohio.—Rev. Stat. (1880), v. 2, p. 1233, § 5056.

Oregon.—Code of Civ. Proc. (1863), p. 38, § 149.

Pennsylvania.—Dunlop's Dig., p. 677, § 6.

alike to legal and to equitable actions. The second type of these statutes differs from the former one, only in the provisions being more general, and extending to all suits which could possibly furnish an occasion for the operation of the original doctrine. The constructive notice in all actions to which the equitable rule would have applied, is made to depend upon the filing or recording of a proper notice.[1] It is only necessary to add that all the special rules collected in the foregoing paragraphs, concerning the commencement of the *lis pendens*, its continuance as long as the suit is diligently prosecuted, its termination by the final judgment which ends the action, the sufficient description or identification of the subject-matter by the allegations of the pleadings, and the persons who are affected by the constructive notice, are still in force, and apply to all cases which come within the operation of the statutory provisions.[2]

§ 641. **5. By Judgments.**—By the original doctrine of equity, independent of all statutory changes, it was settled that a final judgment or decree by which the *lis pendens* is ended and the controversy is terminated, was not a constructive notice to persons not parties to the suit,[3] except to a purchaser *pendente lite*.[4] It should be remembered in this connection that a decree in chancery originally acted only upon the person of a defendant, and did not create any interest or title in or lien upon the

Rhode Island.—Gen. Stat. (1872), p. 456, § 12.

South Carolina.—Rev. Stat. (1873), p. 600, § 155.

Virginia.—Code (1860), p. 770, § 5.

West Virginia.—Rev. Stat. (1879), v. 2, p. 932, § 14.

Wisconsin.—Rev. Stat. (1871), v. 2, p. 1428, § 7.

[1] In some of these statutes the operation of the statutory notice is confined to particular kinds of personal property.

Kansas.—Comp. Laws, Dassler's ed. (1881), p. 612, § 81.

Maine.—Rev. Stat. (1871), p. 620, § 24; p. 626, § 56.

Massachusetts.—Gen. Stat. (1860), p. 626, § 51; p. 627, § 57; also Suppl't (1860), p. 12, § 1; Suppl't (1873), p. 46, § 1.

New Hampshire. — Gen. Laws (1878), p. 518, § 3, p. 519, § 16.

Vermont.—Gen. Stat. (1870), p. 294, § 37; p. 997, § 1.

[2] See as illustrations, Todd v. Outlaw, 79 N. C. 235; Majors v. Cowell, 51 Cal. 478; Dresser v. Wood, 15 Kans. 344; Mills v. Bliss, 55 N. Y. 139; Sheridan v. Andrews, 49 Id. 478; Brown v. Goodwin, 75 Id. 409; Mitchell v. Smith, 53 Id. 413; Ayrault v. Murphy, 54 Id. 203; Fuller v. Scribner, 76 Id. 190; Page v. Waring, 76 Id. 463; Farmers' Nat. B'k v. Fletcher, 44 Iowa, 252; Stuyvesant v. Hone, 2 Barb. Ch. 151; Stuyvesant v. Hone, 1 Sandf. Ch. 419; White v. Perry, 14 W. Va. 66; Mayberry v. Morris, 62 Ala. 113; Tredway v. McDonald, 51 Iowa, 663; Jones v. McNarrin, 68 Me. 334; Weeks v. Tomes, 16 Hun, 349; Jaffray v. Brown, 17 Id. 575; Drake v. Crowell, 40 N. J. L. 58.

[3] Worsley v. Earl of Scarborough, 3 Atk. 392; Churchil v. Grove, 1 Ch. Cas. 35; Freem. Ch. Cas. 176; Lane v. Jackson, 20 Beav. 535; Lee v. Green, 6 De G. M. & G. 155.

[4] The notice then arose from the *lis pendens*, and not by virtue of any particular attribute of the judgment itself. See *ante*, §§ 633, 634, on the effect of a *lis pendens*.

property affected by the suit.[1] While this original rule was still unmodified by statute, a purchaser of the property affected by a judgment, even though it was not docketed, would be bound by it, provided he had, prior to the purchase, received actual notice of it.[2] If it was shown that a subsequent purchaser had made a search for judgments, actual notice of an existing judgment might also be inferred from that fact.[3] The British parliament has, within the past generation, completely changed the original law concerning the effect of judgments, and has adopted another policy for England and Ireland, which is carried out by very stringent statutory enactments. By a progressive series of statutes, a system of registration has been established for all judgments and decrees; if duly registered within the times and in the modes prescribed by the statutes, they operate as constructive notice; all judgments and decrees not thus duly registered within the times and in the manner prescribed are declared to be void or to lose their priority, both in law and in equity, as against subsequent purchasers, mortgagees, and creditors, notwithstanding any notice which the latter-named persons may have had.[4] Under these statutes, no notice, either constructive or actual, can take the place of a regular registry. A subsequent purchaser, mortgagee, or creditor obtaining an interest in or claim on the land, where the prior judgment or decree was not properly registered in pursuance of the statute, is protected even though he had received the most complete actual notice of such judgment or decree. The legislative policy is that a purchaser or incumbrancer should

[1] See Lee v. Green, 6 De G. M. & G. 155, 168, *per* Lord Ch. Cranworth.

[2] Davis v. Strathmore, 16 Ves. 419.

[3] Procter v. Cooper, 2 Drew. 1; 18 Jur. 444; 1 Jur. N. S. 149. As to the effect of notice or want of notice of a registered judgment upon a purchaser, see Knight v. Pocock, 24 Beav. 436; Governors of the Gray Coat Hospital v. Westminster etc. Comm'rs, 1 De G. & J. 531; Freer v. Hesse, 4 De G. M. & G. 495.

[4] See the following English statutes: 1 and 2 Vict., c. 110; 2 and 3 Id., c. 11; 3 and 4 Id., c. 82; 18 and 19 Id., c. 15; 23 and 24 Id., c. 38; 27 and 28 Id., c. 112. As an illustration of the provisions of these statutes and of the system which they establish, I quote a part of § 4 of the act of 18 and 19 Vict., c. 15. After reciting the provisions of the act of 1 and 2 Id., c. 110, as enlarged by the act of 3 and 4 Id., c. 82, said section enacts, "that no judgment or decree, order or rule which might be registered under said act of the first and second years of Her Majesty, shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said act mentioned shall have been left with the proper officer of the proper court, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in any wise notwithstanding." The next section, § 5 of the same act of 18 and 19 Vict., c. 15, after reciting provisions of the prior statutes, and explaining the same, adds: "So that notice of any judgment, decree, or rule not duly registered shall not avail against purchasers, mortgagees, or creditors as to lands, tenements, or hereditaments."

not be obliged to look beyond the official records or books of registry; if a faithful search discloses no judgment, the statute has made him absolutely secure.[1]

§ 642. **American Legislation.**—A statutory policy with respect to judgments has also been adopted in this country, which is substantially the same throughout all the states. The state statutes have generally provided, with variations in the detail, a mode of docketing judgments at law; and the same method has been extended in many states to equitable decrees and judgments for the recovery of money. This docketed judgment or decree is generally made a lien, for a prescribed period of time, upon all lands of the judgment debtor situated within the same county, and a constructive notice to all subsequent purchasers and incumbrancers of such lands. Intended purchasers or incumbrancers are therefore obliged, for their own protection, to make a search of the official records over the period during which the statutory effect is given to the docketed judgment. In many of the states provision is also made by the statutes for the registration or recording of equitable decrees, and for the effect of such recording or registration upon those persons who subsequently acquired interests in the property covered by the decree.

§ 643. In giving an interpretation to these statutes concerning the docketing of judgments and registration of decrees, and in determining the questions which have arisen therefrom concerning the constructive notice created by the docket or record, and concerning any notice which may supply the want of a proper docket or record, rules have been adopted in the various states quite analogous to those established by the courts with reference to the recording or registration of deeds, mortgages, and other instruments. The statement and discussion of these rules and of the questions connected therewith, so far as they fall within the domain of equity, will therefore find their proper place under the next following section concerning priorities.[2]

[1] Greaves v. Tofield, L. R., 14 Ch. Div. 563, 565, *per* Jessel, M. R.; p. 571, *per* James, L. J.; p. 575, *per* Baggallay, L. J.; Lee v. Green, 6 De G. M. & G. 155, 168, *per* Lord Chan. Cranworth; Beavan v. Earl of Oxford, 6 De G. M. & G. 492, 499, 500; Hickson v. Collis, 1 Jo. & Lat. 94, 113, *per* Lord St. Leonards; Shaw v. Neale, 6 H. L. Cas. 581, reversing S. C., 20 Beav. 157. For the statutory system of registration established in Ireland, see the following acts: 3 and 4 Vict., c. 105; 11 and 12 Id., c. 120; 13 and 14 Id., c. 29, and 34 and 35 Id., c. 72; and Hickson v. Collis, 1 Jo. & Lat. 94, 113; Eyre v. McDowell, 9 H. L. Cas. 619; see also the English editor's note to Le Neve v. Le Neve, 2 Eq. Lead. Cas. 140, 141, 142 (4th Am. ed.)

[2] See *post*, §§ 721–724.

§ 644. **6. By Registration or Recording of Instruments.**—The subject to be considered under this subdivision is one of the highest practical importance, both at law and in equity, throughout all the American states. While the decisions of the English courts growing out of the local registration statutes of that country are few, and of little assistance to the American lawyer, those arising under our own statutory system are exceedingly numerous, and often involve questions of great magnitude and difficulty. Many of the questions suggested by these recording acts, and among them those which are the most difficult, and which have occasioned the greatest conflict of judicial opinion, properly belong to the general subject of priorities, and will be examined in the subsequent sections which treat of "Priorities and the Effects of Notice" and of "Purchasers in Good Faith without Notice." In the present subdivision I shall simply consider the effect of the statutory record as a notice; when, how far, and of what the record is a notice; and when and how far any other notice may supply the want of that created by a statutory registration. The whole discussion will be separated into the following subordinate heads: (1) Statement of the statutory system; (2) General theory, object, and scope of the statutes; (3) Requisites of the record in order that it may be a constructive notice; (4) Of what the record is a constructive notice; (5) To whom it is a notice; (6) Effect of other kinds of notice in the absence of a record; (7) What kind of notice is sufficient to produce such effect; (8) Judgments under the recording acts.

§ 645. **(1) The Statutory System in England.**—No general system of registration has ever been adopted in England. For certain special reasons, however, local statutes were passed early in the last century providing for a registration in two or three counties or parts of counties. Other statutes have extended the method of registration into Ireland. The provisions of the different English statutes are the same. They enact, in substance, that a "memorial" of all deeds and conveyances affecting lands within the specified county, may be registered in a prescribed manner; and that "every such conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration," unless a memorial thereof shall be registered before the registering of a memorial of the conveyance under which such subsequent purchaser or mortgagee shall claim.[1] It will be observed that this

[1] See "Registry Act for the West Riding of Yorkshire," 2 and 3 Anne, c. 4; "Registry Act for Middlesex," 7 Anne, c. 20; for North Riding of

language providing for registration is permissive, not compulsory; and nothing is said concerning the registry operating as a notice, either actual or constructive, to subsequent purchasers and incumbrancers. In construing this statute the English courts have given a broad meaning to the word "conveyance" in the clause which provides for the registration of any "deed or conveyance." They hold that it denotes any instrument which carries from one person to another an interest, whether legal or equitable, in land. It would therefore embrace any instrument in writing, though not under seal, which created an equitable lien or charge, as well as one creating an estate.[1]

§ 646. **In the United States.**—While there is some variation in the detail among the statutes of the various states, the central conception and essential plan of the system are substantially the same in all. Many of the acts provide in general terms for the recording of deeds and conveyances; others specifically enumerate the kinds of writings which may be registered, including deeds, leases, mortgages, assignments of

Yorkshire, 8 Geo. II., c. 6; for East Riding of Yorkshire, 6 Anne, c. 35; for Kingston upon Hull, 6 Anne, c. 35; Irish Registry Act, 6 Anne, c. 2. There is a very substantial difference between the wording of the Irish act and that of the English statutes, and it more resembles in its design and effect the system which prevails in the United States. It expressly gives an absolute priority to the deed or conveyance first registered, and a subsequent purchaser for value holding the legal estate, even though he has no actual notice of an equitable estate previously registered, is nevertheless bound by such prior registered interest, and compelled to give effect to it. In other words, the prior registry in Ireland is a *constructive* notice to all subsequent purchasers. In this respect the Irish act is the same in its scope and effect as the American system. See the following cases, which give a construction to this statute: Bushell v. Bushell, 1 Sch. & Lef. 98; Latouche v. Lord Dunsany, 1 Id. 159, 160; Thompson v. Simpson, 1 Dr. & War. 459; Drew v. Lord Norbury, 3 Jo. & Lat. 267; 9 Ir. Eq. Rep. 171; Mill v. Hill, 12 Id. 107; 3 H. L. Cas. 828; Hunter v. Kennedy, 1 Ir. Ch. Rep. 148; Corbett v. Cantillon, 5 Id. 126; *In re* Driscoll, 1 I. R. Eq. 285; note of Eng. ed., 2 Eq. Lead. Cas. 119 (4th Am. ed.)

[1] Credland v. Potter, L. R., 10 Ch. 8, 12, *per* Lord Chancellor Cairns. A mortgage had been given which provided for future advances to be made by the mortgagee, and for his being secured by it with respect to such advances. This mortgage had been duly registered under the West Riding act. The mortgagee made a subsequent further advance, and to secure its payment the mortgagor gave a written instrument not under seal creating a further charge upon the premises. The question arose whether this instrument should have been registered so as to give the mortgagee priority over a subsequent second mortgage which was registered. The court held that the instrument was a "conveyance" and should have been registered. Lord Cairns said: "There is no magical meaning in the word 'conveyance;' it denotes an instrument which carries from one person to another an interest in land. Now, an instrument giving to a person a charge upon land gives him an interest in the land; if he has a mortgage already, it gives him a further interest; and so, whether made in favor of a person who has already a charge, or of another person, it is a conveyance of an interest in the land." I see no reason why this decision should not apply, and why the same interpretation should not be given, to the word "conveyance" when it is used in the analogous statutes of the American states.

mortgages and of leases, agreements for the purchase and sale of land, and in fact all species of written instruments by which any estate, interest, or incumbrance, legal or equitable, in or upon land, is created or transferred.[1] In most of the states this language authorizing a registration is permissive only, but in a few of them it is virtually mandatory. Every such conveyance

[1] For additional cases interpreting these statutes, see *post*, § 664. Some knowledge of the *material* portions of these different statutory forms is absolutely essential to any correct understanding of the rules laid down by the courts. The decisions in one state might be entirely misleading in another state, unless the peculiar statutory language in the first were observed. As mentioned in the text, several types of legislation prevail in the various states. I have arranged the statutes into classes, according to these types, which are determined by the material and controlling terms found in each. The statutes of each class are substantially alike, with respect to these main features, although their language may vary considerably. In almost every state it is enacted that filing or depositing the instrument for record in the proper office, has the same effect with respect to notice, priority, etc., as the actual registration produces.

First Class.—No period is specified within which the record must be made. No express mention is made of notice, actual or constructive, in place of a record. The material provision is, in substance, that every conveyance not duly recorded shall be void as against subsequent purchasers or mortgagees in good faith and for a valuable consideration, whose conveyance is first duly recorded. In several of these states *creditors* are joined with subsequent purchasers. In some "conveyance" includes every instrument affecting land; and assignments of mortgages are often expressly mentioned in statutes belonging to all the classes.

New York.—2 R. S., p. 1119, § 165; Fay's Dig. of Laws (1876), v. 1, p. 580. See Westbrook v. Gleason, 79 N. Y. 23, and cases cited; Judson v. Dada, 79 Id. 373; Page v. Waring, 76 Id. 463; Lacustrine etc. Co. v. Lake Guano etc. Co., 82 Id. 476; Hoyt v. Thompson, 5 Id. 347; Newton v. McLean, 41 Barb. 285; Schutt v. Large, 6 Id. 373; Truscott v. King, 6 Id. 346; Fort v. Burch, 6 Id. 60.

California.—Civ. Code, §§ 1107, 1213–1217, 2934, 2935, 2950. See Odd Fellows S. Bk. v. Banton, 46 Cal. 603; McMinn v. O'Connor, 27 Id. 238; Fogarty v. Sawyer, 23 Id. 570; Woodworth v. Guzman, 1 Id. 203; Call v. Hastings, 3 Id. 179; Bird v. Dennison, 7 Id. 297; Chamberlain v. Bell, 7 Id. 292; Dennis v. Burritt, 6 Id. 670; Hunter v. Watson, 12 Id. 363; McCabe v. Grey, 20 Id. 509; Snodgrass v. Ricketts, 13 Id. 359; Landers v. Bolton, 26 Id. 393; Frey v. Clifford, 44 Id. 335; Packard v. Johnson, 51 Id. 545; Wilcoxson v. Miller, 49 Id. 193; Patterson v. Donner, 48 Id. 369; Long v. Dollarhide, 24 Id. 218; Fair v. Stevenot, 29 Id. 486; Mahoney v. Middleton, 41 Id. 41; Jones v. Marks, 47 Id. 242; O'Rourke v. O'Connor, 39 Id. 442; Smith v. Yule, 31 Id. 180; Thompson v. Pioche, 44 Id. 508; Lawton v. Gordon, 37 Id. 202; Vassault v. Austin, 36 Id. 691.

Colorado.—Gen. Laws, p. 139, ch. 18, § 17.

Dakota.—Rev. Code (1877), p. 341, § 671.

Idaho.—Rev. Laws (1875), p. 601.

Michigan.—Comp. Laws (1871), pp. 1345, 1346, § 4321. See Doyle v. Stevens, 4 Mich. 87; Warner v. Whittaker, 6 Id. 133; Barrows v. Baughman, 9 Id. 213; Willcox v. Hill, 11 Id. 256, 263; Rood v. Chapin, Walk. Ch. 79; Godfroy v. Disbrow, Id. 260.

Minnesota.—Stat. (1878), p. 537, c. 40, § 21; Smith v. Gibson, 15 Minn. 89, 99; Coy v. Coy, 15 Id. 119, 126.

Montana.—Laws (1872), pp. 400, 401.

Nevada.—Comp. Laws (1873), p. 83, §§ 252–254; see Grellet v. Heilshorn, 4 Nev. 526.

North Carolina.—Battle's Rev. (1873), p. 354, c. 35, § 12. Unless recorded conveyance is void as against *creditors* and subsequent purchasers for value. No notice whatever will take the place of a record. Robinson v. Willoughby, 70 N. C. 358; Fleming v. Burgin, 2 Ired. Eq. 584; Leggett v. Bullock, Busb. L. 283.

Washington.—Laws (1859), p. 299.

Wisconsin.—Rev. Stat. (1871), p.

or other instrument unless recorded, is declared to be void as against subsequent purchasers or incumbrancers in good faith for a valuable consideration whose muniments of title are first put on record. In several of the states the effect of a notice of a prior unregistered instrument is expressly recognized by the statute; in a few of them such a notice is required to be "ac-

1147, § 27; see Ely v. Wilcox, 20 Wisc. 551. Possession a constructive notice. Ely v. Wilcox, 20 Wisc. 551; Stewart v. McSweeney, 14 Id. 468; Fery v. Pfeiffer, 18 Id. 510; Gee v. Bolton, 17 Id. 604.

Connecticut. — Rev. (1875), p. 353, § 11. Quite different in terms from the foregoing. No conveyance is effectual against any other person except the grantor and his heirs, until recorded. Record of an instrument creating an equitable interest is notice to every one of such interest. See Hartmyer v. Gates, 1 Root, 61; Ray v. Bush, 1 Id. 81; Franklin v. Cannon, 1 Id. 500; Welch v. Gould, 2 Id. 287; Judd v. Woodruff, 2 Id. 298. Priority. St. Andrews v. Lockwood, 2 Root, 239; Hall's Heirs v. Hall, 2 Id. 383; Beers v. Hawley, 2 Conn. 467; Hinman v. Hinman, 4 Id. 575; Hine v. Robbins, 8 Id. 342; Wheaton v. Dyer, 15 Id. 307. Defective deed no notice. Watson v. Wells, 5 Conn. 468; Carter v. Champion, 8 Id. 549; Sumner v. Rhoda, 14 Id. 135. Equitable conveyance. Dickenson v. Glenney, 27 Conn. 104.

New Hampshire.—Gen. Laws (1878), p. 323, c. 135, § 4. Like Connecticut. See Patten v. Moore, 32 N. H. 382, 384.

Rhode Island.—Gen. Stat. (1872), p. 350, c. 162, § 4. Like Connecticut.

Vermont.—Gen. Stat. (1870), p. 448, § 7. Like Connecticut. See Griswold v. Smith, 10 Vt. 452.

Second Class.—No period is specified within which a record must be made. It is provided in substance that conveyances not recorded are void as to subsequent purchasers and incumbrancers in good faith *without notice*, whose instruments are first recorded. In some states creditors are added to subsequent purchasers.

Arkansas.—Digest (1874), p. 275, § 861. No deed, or instrument, for the conveyance of any real estate, or by which the title thereto may be effected, shall be valid against a subsequent purchaser for a valuable consideration without *actual notice*, or against any creditor, unless it be filed for record. See Byers v. Engles, 16 Ark. 543; Hamilton v. Fowlkes, 16 Id. 340; also Ibid, p. 770, § 4288. Mortgages are a lien only from time of filing for record. See Dacoway v. Galt, 20 Ark. 190.

Delaware.—Laws (1874), p. 504, c. 83, §§ 17, 19. As to mortgages like Arkansas. Deeds must be recorded within *one year*, or else invalid against subsequent fair creditors, mortgagees, or purchasers for a valuable consideration and without notice.

Florida.—Bush's Dig., p. 151. Unless recorded, void as against creditors, and subsequent purchasers for value and without notice.

Illinois.—Rev. Stat. by Hurd (1880), p. 271, § 30. Unless recorded, are void as against creditors and subsequent purchasers for value without notice.

Iowa.—Rev. Code by Miller (1880), p. 527, § 1941. Substantially same as last. See, concerning notice, Senter v. Turner, 10 Iowa, 517; Brinton v. Seevers, 12 Id. 389; Dargin v. Beeker, 10 Id. 571; Koons v. Grooves, 20 Id. 373; Bringholff v. Munzenmaier, 20 Id. 513; Gardner v. Cole, 21 Id. 205; Willard v. Kramer, 36 Id. 22. Subsequent purchasers. Calvin v. Bowman, 10 Iowa, 529; Scoles v. Wilsey, 11 Id. 261; Miller v. Bradford, 12 Id. 14; Bostwick v. Powers, 12 Id. 456; English v. Waples, 13 Id. 570; Haynes v. Seachrest, 13 Id. 455; Breed v. Conley, 14 Id. 269; Stewart v. Huff, 19 Id. 557; Gower v. Doheney, 33 Id. 36.

Kansas.—Comp. Laws (1879), by Dassler, p. 212, § 1043. Filing for record is notice. Until so filed, instruments are not valid except between the parties and as to persons having actual notice. See, concerning notice, School Dist. v. Taylor, 19 Kans. 287; Simpson v. Munder, 3 Id. 172; Brown v. Simpson, 4 Id. 76; Claggett v. Crall, 12 Id. 393, 397; Wickersham v. Chicago etc. Co., 18 Id. 487; Johnson v. Clark, 18 Id. 157, 164; Jones v. Lapham, 15 Id. 540.

Kentucky.—Gen. Stat. (1873), p. 256, § 10. Until filed for record are

tual;" while in the majority the legislation is silent upon the subject of notice in the place of recording, and its effect is thus left to judicial construction. It would be impossible to give in the text any more exact account of this legislative system, but I have added in the preceding foot-note an abstract of the statutes, the states being arranged in classes according to the varying types of their legislation.

invalid against subsequent purchasers for value without notice, or against creditors. See Graves v. Ward, 2 Duv. 301. Effect of notice. Forepaugh v. Appold, 17 B. Mon. 625, 631.

Maine.—Rev. Stat. (1871), p. 560, c. 73, § 8. Unless recorded are not valid against any one except the grantor, his heirs, devisees, and persons having *actual* notice. See Porter v. Sevey, 43 Me. 519; Goodwin v. Cloudman, 43 Id. 577; Merrill v. Ireland, 40 Id. 569; Hanly v. Morse, 32 Id. 287; Spofford v. Weston, 29 Id. 140; Butler v. Stevens, 26 Id. 484; Roberts v. Bourne, 23 Id. 165; Veazie v. Parker, 23 Id. 170; Pierce v. Taylor, 23 Id. 246; Rackleff v. Norton, 19 Id. 274; Lawrence v. Tucker, 7 Id. 195; Kent v. Plummer, Id. 464.

Massachusetts.—Gen. Stat., p. 466, c. 89, §§ 1-3. Same as Maine. See Stetson v. Gulliver, 2 Cush. 494, 497; Dole v. Thurlow, 12 Metc. 157, 163; Bayley v. Bailey, 5 Gray, 505, 510; Marshall v. Fisk, 6 Mass. 24, 30; Coffin v. Ray, 1 Metc. 212; Flynt v. Arnold, 2 Id. 619; Curtis v. Mundy, 3 Id. 405; Houghton v. Bartholomew, 10 Id. 138; Pomroy v. Stevens, 11 Id. 244; Stewart v. Clark, 13 Id. 79.

Mississippi.—Rev. Code (1871), p. 503. Unless filed for record, are void against creditors and subsequent purchasers for value without notice.

Missouri.—Wagn. Stat. (1872), p. 277, c. 25, §§ 25, 26. Same as Kansas. See Reed v. Ownby, 44 Mo. 204; Valentine v. Harner, 20 Id. 133; Davis v. Ownsby, 14 Id. 170.

Nebraska.—Comp. Stat. (1881), p. 389, c. 73, § 16. Unless recorded, are void against subsequent purchasers and incumbrancers in good faith and without notice, who obtain the first record. See as to constructive notice, Edminster v. Higgins, 6 Neb. 269; Galway v. Malchow, 7 Id. 289, overruling Bennet v. Fooks, 1 Id. 465; Metz v. State B'k of Brownville, 7 Id. 171; Colt v. Du Bois, 7 Id. 394; Dorsey v. Hall, 7 Id. 465; Mansfield v. Gregory, 8 Id. 435; Berkley v. Lamb, 8 Id. 399. Consideration necessary. Merriman v. Hyde, 9 Neb. 120. Priority. Harral v. Gray, 10 Id. 189; Lincoln B. & S. Association v. Hass, 10 Id. 583; Hooker v. Hammill, 7 Id. 234; Jones v. Johnson Harvester Co., 8 Id. 451.

New Mexico.—Comp. Laws (1865), c. 44. Substantially same as Kansas.

Tennessee.—Code, §§ 2005, 2032. Unless recorded, void against existing or subsequent creditors, or *bona fide* purchasers without notice. Filing for record is notice. See Thomas v. Blackemore, 5 Yerg. 113, 124; Hays v. McGuire, 8 Id. 92, 100; Vance v. McNairy, 3 Id. 176; Shields v. Mitchell, 10 Id. 8; May v. McKeenon, 6 Humph. 209.

Texas.—Pasch. Dig., §§ 4334, 4988, 4994. Substantially same as Illinois.

West Virginia.—Code (1870), c. 74, §§ 5-8. Substantially as Illinois.

Third Class.—The peculiar features of the statutes of this class are, that they require the record to be made within a specified period after execution of the instrument, or else it is void as against subsequent purchasers who are *without notice*, and in some states *creditors* are added. Filing for record is generally made equivalent to an actual recording.

Alabama.—Code (1867), p. 364, §§ 1557, 1558. Conveyances of unconditional estates, mortgages, and similar instruments to secure *a debt created at the date thereof*, are void as to purchasers for a valuable consideration, mortgagees, and judgment creditors, having no notice, unless recorded within *three months* from their date. Other deeds and mortgages are void as to the same parties unless recorded before the rights of such parties accrue. See Coster v. B'k of Ga., 24 Ala. 37; De Vendal v. Malone, 25 Id. 272; Gray's Adm'rs v. Cruise, 36 Id. 559. Notice in place of recording. Wallis v. Rhea, 10 Ala. 451; 12 Id. 646; Jordan v. Mead, Id. 247; Dearing v. Watkins, 10 Id. 20; Boyd v.

§ 647. **(2) General Theory, Scope, and Object of the Statutes.**—Under this head I shall explain, without entering into any discussion of details, the general interpretation which has been put upon this legislation by the courts; its general object, scope, and design; how far it is intended that a record should be constructive notice to those who acquire rights in the

Beck, 29 Id. 703; Wyatt v. Stewart, 34 Id. 716. Valid without a record between the parties and against creditors not by judgment. Ohio Life etc. Co. v. Ledyard, 8 Ala. 866; Daniel v. Sorrells, 9 Id. 436; Andrews v. Burns, 11 Id. 691; Smith v. Branch B'k, 21 Id. 125; Center v. P. & M. B'k, 22 Id. 743. Filing for record creates notice, and a mistake in copying by the recorder does not affect it. Mims v. Mims, 35 Ala. 23.

District of Columbia.—Rev. Stat. (1873), pp. 52, 53. Must be recorded within *six months*, or else void as to all subsequent purchasers without notice.

Georgia.—Code (1873), §§ 1955–1960. Deeds must be recorded within *one year*, and mortgages within *three months*, otherwise they lose their priority over subsequent deeds, purchases, and liens recorded in time and without notice of the first. A record after the prescribed period is notice from that time. See Hardaway v. Semmes, 24 Ga. 305. As to notice, Herndon v. Kimball, 7 Id. 432; Rushim v. Shields, 11 Id. 636; Felton v. Pitman, 14 Id. 536; Wyatt v. Elam, 19 Id. 335; Burkhalter v. Ector, 25 Id. 55; Lee v. Cato, 27 Id. 637; Allen v. Holding, 29 Id. 485; S. C., 32 Id. 418; Williams v. Logan, 32 Id. 165; Williams v. Adams, 43 Id. 407.

Ohio.—Rev. Stat. (1880), v. 1. pp. 1034, §§ 4133, 4134. All instruments for the conveyance or incumbrance of land must be recorded within *six months*, otherwise are deemed fraudulent as to any subsequent *bona fide* purchaser having at the time of his purchase no knowledge of the existence of such prior instrument. Record made after the six months is notice from the date thereof. See Doe v. B'k of Cleveland, 3 McLean, 140; Smith v. Smith, 13 Ohio St. 532; Lessee of Cunningham v. Buckingham, 1 Ohio, 264; Lessee of Allen v. Parish, 3 Id. 107; Northrup's Lessee v. Brehmer, 8 Id. 392; Lessee of Irvin v. Smith, 17 Id. 226; Spader v. Lawler, 17 Id. 371; Leiby's Ex'rs v. Wolf, 10 Id. 83; Price v. Methodist Episcopal Church, 4 Id. 515; Stansell v. Roberts, 13 Id. 148; Mayham v. Coombs, 14 Id. 428; Bloom v. Noggle, 4 Ohio St. 45; Bercaw v. Cockerill, 20 Id. 163.

South Carolina.—Rev. Stat. (1873), pp. 422, § 1, 424. Conveyances must be recorded within *six months* and mortgages within *sixty days*, or else invalid against subsequent creditors, purchasers, and incumbrancers for value and without notice. See Williams v. Beard, 1 S. C. 309; Boyce v. Shiver, 3 Id. 515; Steele v. Mansell, 6 Rich. 437; Stokes v. Hodges, 11 Rich. Eq. 135; B'k of State v. S. C. Man. Co., 3 Strobh. 190; Tact v. Crawford, 1 McCord, 265; Massey v. Thompson, 2 Nott & McC. 105; Dawson v. Dawson, Rice Eq. 243; McFall v. Sherrard, Harper, 295.

Virginia.—Code (1873), ch. 114, §§ 4–9. Mortgages unless recorded are void as to creditors and subsequent purchasers for value and without notice. Deeds, unless recorded within *sixty days*, are void as to same parties. See Beverley v. Ellis, 1 Rand. 102; Bird v. Wilkinson, 4 Leigh, 266; Beck's Adm'rs v. De Babtists, 4 Id. 349; Lane v. Mason, 5 Id. 520; McClure v. Thistle's Ex'rs, 2 Gratt. 182; Glazebrook's Adm'r v. Ragland's Adm'r, 8 Id. 344.

Fourth Class.—The statutes of this class resemble those of the last one in requiring the record to be made within a prescribed period of time after the execution; but they make no mention of the presence or absence of notice in connection with the subsequent purchasers, etc., who obtain a first record.

Indiana.—Stat. by Gavin & Hord, p. 260, § 16, p. 261. Every conveyance, etc., not recorded within *ninety days*, is void against a subsequent purchaser or mortgagee in good faith and for a valuable consideration. See Reasoner v. Edmundson, 5 Ind. 393.

Maryland.—Rev. Code (1878), p. 385, §§ 16–19. Instruments must be recorded within *six months*, and then take effect from their date; otherwise they are not valid for purpose of passing title. See Byles v. Tome, 39

same subject-matter; and what kinds and classes of interests are thus affected by a notice.

§ 648. **The English Theory.**—A very narrow interpretation has been put upon their local registry acts by the English courts. As the language authorizing a registration is permissive merely, and as the statute is silent respecting any notice, it is settled that the registry of a deed or conveyance is not of itself a notice so as to affect a subsequent purchaser who has obtained the legal estate.[1] If, however, it be shown that a sub-

Md. 461; Cooke's Lessee v. Kell, 13 Id. 469; Hoopes v. Knell, 31 Id. 550; Building Ass'n v. Willson, 41 Id. 514. Effective from date when recorded. Owens v. Miller, 29 Md. 144; Leppoc v. Nat. Union B'k, 32 Id. 136; Knell v. Building Ass'n, 34 Id. 67; Adm'rs of Carson v. Phelps, 40 Id. 97; Lester v. Hardesty, 29 Id. 50; Estate of Leiman, 32 Id. 225. Priority. Cockey v. Milne's Lessee, 16 Md. 207; Willard's Ex'rs v. Ramsburg, 22 Id. 206; Nelson v. Hagerstown Bank, 27 Id. 51; Walsh v. Boyle, 30 Id. 267; Glenn v. Davis, 35 Id. 215; Busey v. Reese, 38 Id. 264; Homer v. Grosholz, 38 Id. 521; Abrams v. Sheehan, 40 Id. 446; Kane v. Roberts, 40 Id. 590.

New Jersey.—Revision, p. 155, § 14. No instrument is valid against subsequent purchasers or incumbrancers in good faith, unless filed for record within *fifteen days* from its date.

Oregon.—Gen. Laws, p. 651, § 26. Unless recorded within *five days*. is void against subsequent purchaser in good faith and for value whose instrument is first recorded.

Pennsylvania.—Purdon's Dig., p. 321, § 71. Instruments executed within the state must be recorded within *six months*, those executed out of the state within *one year*, otherwise they do not operate to pass the title. See, as to parties against whom unrecorded instrument is valid: Nice's Appeal, 54 Pa. St. 200; Speer v. Evans, 47 Id. 141; Britton's Appeal, 45 Id. 172; Mellor's Appeal, 32 Id. 121; Adams' Appeal, 1 Id. 447. Priority. Brooke's Appeal, 64 Pa. St. 127; Dungan v. Am. etc. Ins. Co., 52 Id. 253; Bratton's Appeal, 8 Id. 164; Foster's Appeal, 3 Id. 79; Ebner v. Goundie, 5 W. & S. 49; Poth v. Anstatt, 4 Id. 307; Lightner v. Mooney, 10 Watts. 407. Judgment creditors. Cover v. Black, 1 Barr. 493; Stewart v. Freeman, 10 Harris, 123. Applies to a *bona fide* purchaser only: Plumer v. Robertson, 6 S. & R. 179; Poth v. Anstatt, 4 W. & S. 307; Bracken v. Miller, 4 Id. 102; Hoffman v. Strohecker, 7 Watts, 90; Jacques v. Weeks, 7 Id. 261; Union Canal Co. v. Young, 1 Whart. 432; Sailor v. Hertzog, 4 Id. 264; Snider v. Snider, 3 Phila. 160. Notice. Chen v. Barnet, 11 S. & R. 389; Harris v. Bell, 10 Id. 39; Boggs v. Varner, 6 W. & S. 469; Parke v. Chadwick, 8 Id. 96; Miller v. Cresson, 5 Id. 284; Green v. Drinker, 7 Id. 440; Krider v. Lafferty, 1 Whart. 303; Epley v. Witherow, 7 Watts, 167; Rankin v. Porter, 7 Id. 387; Kerns v. Swope, 2 Id. 75; Lewis v. Bradford, 10 Id. 67; Randall v. Silverthorn, 4 Barr. 173; Hetherington v. Clark, 6 Casey, 393. Equitable title included. Bellas v. McCarty, 10 Watts, 13. Assignment of mortgage. Philips v. B'k of Lewistown, 6 Harris, 394; Mott v. Clark, 9 Barr, 399. Mortgage of personal property. Lightner v. Mooney, 10 Watts, 407; Hoffman v. Strohecker, 7 Id. 86.

Wyoming.—Comp. Laws, c. 40. Must be recorded within three months, and is then notice to and takes precedence of subsequent purchasers.

Louisiana.—Rev. Code (1875), p. 417, § 2266. This statute differs much from all others in its language and details, although not much perhaps in its effects. All instruments affecting real property are utterly void as to third persons, unless publicly inscribed on the records of the parish, and become effective as to such persons from the time of filing for record; but they are valid as against the parties and their heirs.

[1] Morecock v. Dickins, Ambl. 678; Bushell v. Bushell, 1 Sch. & Lef. 90, 103; Ford v. White, 16 Beav. 120; Underwood v. Lord Courtown, 2 Sch. & Lef. 40; Wiseman v. Westland, 1 Y. & J. 117; Hodgson v. Dean, 2 S. & S. 221. Thus a prior equitable

sequent purchaser made a search of the proper records, then it may be presumed that he thereby obtained actual notice of a prior conveyance which was registered.[1] The same restricted and imperfect view was taken by a few of the early American cases, which appear to have held that a record did not operate as an absolute constructive notice to subsequent purchasers, and that the statutes did not embrace conveyances of equitable rights and interests, so that the record of such a conveyance would not be a notice.[2]

§ 649. **The American Theory.**—A broader and more effective interpretation has been established throughout the American states, by an overwhelming weight of judicial authority. The recording statutes have been regarded with the utmost favor, and our whole system of conveyancing and of land titles has been based upon them. Indeed, the tendency of modern legislation has been to enlarge their scope, and to define their operation so that they should in terms include every kind of

incumbrance, though registered, will not affect a subsequent purchaser without notice who has obtained the legal estate. Morecock v. Dickins, and Bushell v. Bushell, *supra*. The Irish Acts seem to be different in this respect. See *ante*, note under § 645 and cases there cited. A prior conveyance of an equitable interest if registered, would doubtless take precedence of a subsequent *equitable* interest also registered, in pursuance of the general doctrine that among *equities* otherwise equal, the one prior in time must prevail.

[1] Hodgson v. Dean, 2 S. & S. 221; Lane v. Jackson, 20 Beav. 535.

[2] Grimstone v. Carter, 3 Paige, 421, 437; Doswell v. Buchanan, 3 Leigh, 394. See, also, Gouverneur v. Lynch, 2 Paige, 300; De Ruyter v. Trustees etc., 2 Barb. Ch. 556; Ludlow v. Van Ness, 8 Bosw. 178; Swigert v. Bank etc., 17 B. Mon. 268, 290; Corn v. Sims, 3 Metc. (Ky.) 348; Walker v. Gilbert, 1 Freem. Ch. 75; Kelly v. Mills, 41 Miss. 267; Jaques v. Weeks, 7 Watts, 261, 268, 272. I add a short extract from the opinion in Grimstone v. Carter, *supra*, which well illustrates this partial theory. A deed had been given, absolute on its face, but really intended as a security for a debt, and it was accompanied by a verbal agreement by the grantee—the creditor—to reconvey upon payment. The land having been conveyed by the grantee to a subsequent purchaser, the question was, how far the latter's rights were affected by the verbal agreement. The court held that the recording or not recording of such agreement was wholly immaterial upon this question; the subsequent purchaser would be bound by the agreement if he had notice of it whether it was recorded or not; he would not be bound, in the absence of notice, even though it had been recorded. Chancellor Walworth said: The design of the recording act was "to protect a *bona fide* purchaser against a previous conveyance of the *legal* estate or of some part thereof, which would be valid against him if the recording act had not been passed. But a purchaser did not need the aid of the legislature to protect him against a prior equity or a mere agreement to convey. Having the legal title under his conveyance, he would be able to defend his title at law, and a plea that he was a *bona fide* purchaser for a valuable consideration would afford him a full protection against an equitable claim of which he had no previous notice." Independently of any judicial construction opposed to this view, it will be seen that the statutes of many states are directly in conflict with it, since they provide in express terms for the recording of agreements to convey and other instruments creating only an equitable interest.

instrument by which the ownership and enjoyment of land can be affected. By this theory, the object of the legislation is that the proper record of every such instrument should be absolute notice of its contents, and of all rights, titles, or interests, legal and equitable, created by or embraced within it, to every person subsequently dealing with the subject-matter whose duty or interest it is to make a search of the records. The intention is to compel every person receiving such an instrument to place it upon the records, in order that he may thereby protect his own rights as well as those of all others who may afterwards acquire an interest in the same property. It was designed that the public records should, in this manner, furnish an accurate and complete transcript and exhibition of all estates, titles, interests, claims, incumbrances, and charges both legal and equitable, in and upon every parcel of land which had come into private ownership within the territorial limits over which the particular record extends; and that a person about to deal with respect to any parcel of land, should be able to discover, or find the means of discovering, every existing and outstanding estate, title, or interest in it which could affect the rights of a *bona fide* purchaser. This is the theory of the legislation as established by judicial interpretation; and this general design has, as far as possible, been carried into effect by the courts.[1] It is therefore settled, even independently of the express terms of many state statutes, that equitable estates and interests, as well as legal, are embraced within the intent and operation of the recording acts, and that any instrument creating or conveying such an interest which is duly recorded, must thereby obtain all the benefits which depend upon or flow from the fact of registration under these statutes.[2]

[1] Bird v. Dennison, 7 Cal. 297; Chamberlain v. Bell, 7 Id. 292; Call v. Hastings, 3 Id. 179; Woodworth v. Guzman, 1 Id. 203; Dennis v. Burritt, 6 Id. 670; Hunter v. Watson, 12 Id. 363; McCabe v. Grey, 20 Id. 509; Grant v. Bissett, 1 Caines' Cas. 112; Jackson v. Given, 8 Johns. 137; Jackson v. Van Valkenburgh, 8 Cow. 260; Rounds v. McChesney, 7 Id. 360; Cook v. Travis, 20 N. Y. 400; Wood v. Chapin, 13 Id. 509; Webster v. Van Steenbergh, 46 Barb. 211; Taylor v. Thomas, 5 N. J. Eq. (1 Halst. Ch.) 331; Losey v. Simpson, 11 Id. (3 Stockt. Ch.) 246; Routh v. Spencer, 38 Ind. 393; Holbrook v. Dickenson, 56 Ill. 497; Hogden v. Guttery, 58 Id. 431; Harrington v. Allen, 48 Miss. 493; Ohio L. Ins. Co. v. Ledyard, 8 Ala. 866; Peychaud v. Citizens' B'k, 21 La An. 262; Harang v. Plattsmier, Id. 426.

[2] Digman v. McCollum, 47 Mo. 372, 375, 376; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Alexander v. Webster, 6 Md. 359; Alderson v. Ames, 6 Id. 52; Gen. Ins. Co. v. The U. S. Ins. Co., 10 Id. 517; Bellas v. McCarty, 10 Watts, 13; Russell's Appeal, 3 Harris, 319; Siter v. McClanachan, 2 Gratt. 280; Hunt v. Johnson, 19 N. Y. 279; Doyle v. Teas, 4 Scam. 202; Wilder v. Brooks, 10 Minn. 50; Dickenson v. Glenney, 27 Conn. 104; Parkist v. Alexander, 1 Johns. Ch. 394; Boyce v. Shiver, 3 S. C. 515. A mortgage by a vendee of his equitable interest

§ 650. **(3) Requisites of the Record in Order that it may be a Constructive Notice.**—Since the constructive notice arising from a registration is unknown to the common law, and is entirely a creation of the statute, it is plain that the provisions of the statute must be exactly compiled with, or else there will be no resulting notice. Certain requisites are prescribed by the legislation; they are all essential; without them the object of the proceeding would wholly fail. I purpose to state and explain these requisites as they have been inferred from the statutory provisions, and settled by the decisions. They relate to the form, execution, and contents of the instrument, and to the form and manner of the registration.

§ 651. **The Form and Kind of Instrument.**—The record operates as a constructive notice only when the instrument itself is one of which the registration is required or authorized by the statute. The voluntary recording, therefore, of an instrument, when not authorized by the statute, would be a mere nullity, and would not charge subsequent purchasers with any notice of its contents or of any rights arising under it.[1]

under a land contract. Bk. of Greensboro v. Clapp, 76 N. C. 482; Crane v. Turner, 7 Hun, 357; 67 N. Y. 437. In U. S. Ins. Co. v. Shriver, *supra*, the court stated the doctrine as follows: The legislative intent was "that all rights, incumbrances, or conveyances, touching, connected with, or in any way concerning land, should appear upon the public records. It followed that conveyances of equitable interests in land were within the registry acts; and that a conveyance of such an interest, which, though subsequent in date, is first recorded, must be preferred, unless the grantee had actual notice of the prior unregistered deed."

As illustrations: A subsequent purchaser has constructive notice of a prior recorded incumbrance, *e. g.*, a mortgage or a deed of trust, even though the incumbrancer's own title, which was a mere agreement to convey, was not recorded. Digman v. McCollum, 47 Mo. 372, 375, 376. An agreement in writing to convey land, though not under seal, creating an equitable interest, is protected by a record. Brotherton v. Livingston, 3 Watts & Serg. 334; Schutt v. Large, 6 Barb. 373; Kiser v. Heuston, 38 Ill. 252; and see cases cited at the commencement of this note. The record of a voluntary conveyance or deed without consideration is notice to a subsequent purchaser, and tends to remove the presumption of bad faith or fraud as against such purchaser. Beal v. Warren, 2 Gray, 447; Mayor v. Williams, 6 Md. 235; Williams v. Bank, 11 Id. 198; Cooke's Lessee v. Kell, 13 Id. 469, 493.

The doctrine stated in the text and sustained by the decisions cited in this note has been affirmed by several state statutes, which in terms provide for the recording of contracts for the sale of land, and other instruments creating a mere equitable interest. See *ante*, note under § 646.

[1] As examples: The entry upon a certain record book in the county clerk's office of lands sold by the United States, being required by the statute only for purposes of taxation, is not a constructive notice to subsequent purchasers of the facts contained in it. Betser v. Rankin, 77 Ill. 289. The record of a deed transferring personal property is not a constructive notice of such transfer, even when the deed was also a conveyance of land, and as such was entitled to be recorded. Pitcher v. Barrows, 17 Pick. 361; Boggs v. Varner, 6 Watts & Serg. 469. The same is true of the recording of an assignment of a mortgage when not authorized by the statute. James v. Morey, 2 Cow.

§ 652. **Execution of the Instrument.**—The record does not operate as a constructive notice, unless the instrument is duly executed, and properly acknowledged or proved so as to entitle it to be recorded. The statutes generally require, as a condition to registration, that the instrument should be legally executed, and that it should be formally acknowledged or proved, and a certificate thereof annexed. If a writing should be placed upon the records with any of these preliminaries entirely omitted or defectively performed, such a record would be a mere voluntary act, and would have no effect upon the rights of subsequent purchasers or incumbrancers.[1]

§ 653. **Form and Manner of the Record.**—Furthermore, the record of an instrument which is itself duly executed and entitled to be registered, does not operate as a constructive notice, unless it is made in the proper form and manner, in the proper book, as required by the statute. The policy of the recording acts is that those persons who are affected with constructive notice should be able to obtain an actual notice and even full knowledge by means of a search. A search could not *ordinarily* be successful and lead the party to the knowledge which he seeks, if the instrument were recorded in a wrong book. This rule, therefore, instead of being arbitrary and

246; Mott v. Clark, 9 Barr, 400; see, also, Graves v. Graves, 6 Gray, 391; Villard v. Robert, 1 Strobh. Eq. 393; Bossard v. White, 9 Rich. Eq. 483; Galpin v. Abbott, 6 Mich. 17; Reed v. Coale, 4 Ind. 283; Brown v. Budd, 2 Carter, 442; Commonwealth v. Rodes, 6 B. Mon. 171, 181; Parret v. Shaubhut, 5 Minn. 323; Burnham v. Chandler, 15 Tex. 441; Lewis v. Baird, 3 McLean, 56.

[1] This rule has been applied under a great variety of circumstances, and to many kinds of defects and imperfections. Pringle v. Dunn, 37 Wisc. 449, 460, 461; Brown v. Lunt, 37 Me. 423; De Witt v. Moulton, 17 Id. 418; Stevens v. Morse, 47 N. H. 532; Isham v. Bennington Iron Co., 19 Vt. 230; Blood v. Blood, 23 Pick. 80; Sumner v. Rhodes, 14 Conn. 135; Carter v. Champion, 8 Id. 548; Parkist v. Alexander, 1 Johns. Ch. 394; Green v. Drinker, 7 W. & S. 440; Heistner v. Fortner, 2 Binn. 40; Strong v. Smith, 3 McLean, 362; Cockey v. Milne, 16 Md. 200; Johns v. Reardon, 3 Md. Ch. 57; 5 Md. 81; Herndon v. Kimball, 7 Ga. 432; Work v. Harper, 24 Miss. 517; Thomas v. Grand Gulf B'k, 9 Sm. & Mar. 201; Graham v. Samuel, 1 Dana, 166; Halstead v. B'k of K'y, 4 J. J. Marsh. 554; White v. Denman, 1 Ohio St. 110; Reynolds v. Kingsbury, 15 Iowa, 238; Barney v. Little, 15 Id. 527; Brinton v. Seevres, 12 Id. 389; Hodgson v. Butts, 3 Cranch, 140; Shults v. Moore, 1 McLean, 521; Harper v. Reno, 1 Freem. Ch. 323. The legislature, however, may provide that a defective acknowledgment shall not invalidate a record, and may even cure such a defect by a retroactive statute as between the parties, but not as against one who has already purchased the land in good faith. Watson v. Mercer, 8 Pet. 88; Gillespie v. Reed, 3 McLean, 377; Barnet v. Barnet, 15 Serg. & R. 72; Tate v. Stooltzfoos, 16 Id. 35; Hughes v. Cannon, 2 Humph. 589; Reed v. Kemp, 16 Ill. 445; Allen v. Moss, 27 Mo. 354; Brown v. Simpson, 4 Kans. 76; Wallace v. Moody, 26 Cal. 387. The statutes in a few states provide that an instrument filed for record shall be a notice, although not properly acknowledged, but that the record can not be used as evidence without the acknowledgment.

technical, is absolutely essential to any effective working of the statutory system.[1] For the same reason the operation of a record as constructive notice is limited territorially. A record is not a notice with respect to any land situated in a different county from that in which the registration is made. The statutes uniformly require the instrument to be registered in the same county in which the land is situated; a record in a different county is, therefore, inoperative as a constructive notice.[2]

§ 654. **Contents of the Record.**—A record is a constructive notice, only when, and so far as, it is a true copy, substantially

[1] Pringle v. Dunn, 37 Wisc. 449, 460, 461; Van Thorniley v. Peters, 26 Ohio St. 471. If the law prescribes that deeds should be recorded in certain books, "books of deeds," and that mortgages should be entered in another set of books, "books of mortgages," the record of a mortgage in a "book of deeds," or of a deed in a "book of mortgages," would be wholly inoperative as a *constructive* notice. Leech's Appeal, 8 Wright, 140; Calder v. Chapman, 52 Pa. St. (2 P. F. Sm.) 359; McLanahan v. Reeside, 9 Watts, 508; Colomer v. Morgan, 13 La. An. 202; Succession of Cordeviolle v. Dawson, 26 Id. 534; Fisher v. Tunnard, 25 Id. 179; Verges v. Prejean, 24 Id. 78; Grimstone v. Carter, 3 Paige, 421. In Leech's Appeal, *supra*, a peculiar instrument which was actually given as security for a debt, and was therefore held to be a mortgage and not an absolute conveyance, had been recorded in a book of deeds; this record was held to be inoperative as a notice. In McLanahan v. Reeside, *supra*, a deed absolute on its face was given accompanied by a separate written defeasance, both constituting a mortgage. They were both recorded in the same book, but at different pages, several pages intervening between the two. The court held that no notice was thereby given of the instrument *as a mortgage*, because a party making a search and finding the deed absolute on its face would be misled, and suppose that other instrument affecting the title. Viele v. Judson, 82 N. Y. 32. It might be supposed that the same rule should apply to a proper indexing. But in Mut. Life Ins. Co. v. Dake, 1 Abb. N. C. 381, it was expressly held that the index is not an essential part of the record; that a mortgage otherwise duly recorded is notice, although not indexed. To the same effect are Curtis v. Lyman, 24 Vt. 338; Bishop v. Schneider, 46 Mo. 472; Throckmorton v. Price, 28 Tex. 605; B'd of Comm'rs v. Babcock, 5 Or. 472. And the same as to a mistake in indexing. Green v. Garrington, 16 Ohio St. 548; but see *per contra*, Speer v. Evans, 47 Pa. St. 141, *per* Woodward, J.

[2] King v. Portis, 77 N. C. 25. If a deed or mortgage covered lands situated in two different counties, and it was recorded in one of them only, it would be effective as to part of the land conveyed, but inoperative as a notice with respect to the other part. Astor v. Wells, 4 Wheat. 466; Lewis v. Baird, 3 McLean, 56; Stevens v. Brown, 3 Vt. 420; Perrin v. Reed, 35 Id. 2; Kerns v. Swope, 2 Watts, 75; Hundley v. Mount, 8 Sm. & Mar. 387; Crosby v. Huston, 1 Tex. 203; St. John v. Conger, 40 Ill. 535; Stewart v. McSweeney, 14 Wisc. 468.

In Kerns v. Swope, 2 Watts, 75, a prior deed of land lying in two counties had been recorded in one of them only, and so was not constructive notice with respect to the land situated in the other. A subsequent purchaser bought and took a conveyance of both tracts. The court held that while this purchaser was not charged with *constructive* notice with respect to the land situated in one of the counties, there arose a *presumption of fact* that he had examined the record, and had thus obtained *actual* notice of the deed of both parcels; that a jury might rely upon such presumption of fact, and might find as a fact that he had received actual notice from such a search of the records. In my opinion, this decision pushes the doctrine of actual notice based upon indirect evidence to the furthest extreme. I seriously doubt its correctness (see *ante*, § 600, and note thereunder).

even if not absolutely correct, of the instrument which purports to be registered, and of all its provisions. Any material omission or alteration will certainly prevent the record from being a constructive notice *of the original instrument*, although it may appear, on the registry books, to be *an* instrument perfect and operative in all its parts. The test is a plain and simple one. It is, whether the record, if examined and read by the party dealing with the premises, would be an *actual* notice to him of the original instrument and of all its parts and provisions. By the policy of the recording acts, such a party is called upon to search the records, and he has a right to rely upon what he finds there entered as a true and complete transcript of any and every instrument affecting the title to the lands with respect to which he is dealing. A record can only be a constructive notice, at most, of whatever is contained within itself.[1] Finally,

[1] As illustrations of such mistakes affecting the operation of the record as a constructive notice, would be an error in the description or location of the premises included in the original deed or mortgage; an error in the name of a grantor or mortgagor; an error in the amount of the debt for which a mortgage is a security, and the like: Jennings v. Wood, 20 Ohio, 261; Miller v. Bradford, 12 Iowa, 14; Hughes v. Debnam, 8 Jones, 127; Wyatt v. Barwell, 19 Ves. 439. In one case a mortgage was given to secure three thousand dollars. In recording it, by a mistake of the clerk or copyist in the registry office, the record was made to read only three hundred dollars. It was held to be a constructive notice only to the extent of three hundred dollars, and to constitute a lien only for that amount as against a subsequent grantee or mortgagee who had no actual notice, and who, it was held, had a right to rely on the record as correctly stating the amount of the debt and the extent of the lien: Peck v. Mallams, 10 N. Y. 509; Beekman v. Frost, 18 Johns. 544; Terrell v. Andrew Co., 44 Mo. 309; Jennings v. Wood, 20 Ohio 261. In this connection the question has arisen concerning the effect of a deed of land absolute on its face, but accompanied by a written defeasance, and thus constituting in reality a mortgage. It is held that both must be recorded together as a mortgage, in order that the registry may be constructive notice of the whole instrument as a mortgage. If the deed alone is recorded, without the accompanying defeasance, it is clear that the record will not be constructive notice of the entire instrument in its intended character as a mortgage; so far as the registry would operate, the instrument *as a mortgage*, would be in the position of a wholly unrecorded mortgage, as against subsequent purchasers and incumbrancers: Brown v. Dean, 3 Wend. 208; James v. Morey, 2 Cow. 246; Dey v. Dunham, 2 Johns. Ch. 182; Friedley v. Hamilton, 17 Serg. & R. 70; Jaques v. Weeks, 7 Watts, 261, 287; Edwards v. Trumbull, 14 Wright, 509; Hendrickson's Appeal, 12 Harris, 363. In this last mentioned case, Black, J., said concerning such a record: "A mortgage, when in the shape of an absolute conveyance with a separate defeasance, the former being recorded and the latter not, gives the holder *no* rights against a subsequent incumbrancer. *It is good for nothing as a conveyance*, because it is in fact not a conveyance; and it is equally worthless as a mortgage, because it does not appear by the record to be a mortgage." To the same effect is Corpman v. Baccastow, 84 Pa. St. 363. This *dictum* concerning the effect of such a record as a conveyance is certainly opposed to the doctrine which generally prevails through the states, and to the policy of the recording acts. A subsequent purchaser for a valuable consideration from the grantee under such circumstances, would, according to the generally accepted doctrine, obtain a good title as against the grantor and all

the record will not be a notice, unless it and the original instrument of which it is a copy correctly and sufficiently describe the premises which are to be affected, and correctly and sufficiently state all the other provisions which are material to the rights and interests of subsequent parties. The premises should at least be so described or identified that a subsequent purchaser or incumbrancer would have the means of ascertaining with accuracy what and where they were.[1] The same rule applies to the record of mortgages and all other incumbrances which can be recorded. The language both of the original and of the record must be such, that if a subsequent purchaser or incumbrancer should examine the instrument itself, he would obtain thereby an actual notice of all the rights which were intended to be created or conferred by it.[2] It seems also to result from the terms of the statute that the recording of a copy is not equivalent to the record of the original instrument, and is not operative as a notice.[3]

§ 655. (4) **Of What the Record is a Notice.**—The doctrine formulated under this head is merely the summing up and result of the various special rules which have been stated in the preceding paragraphs. When all the foregoing requisites to a valid registration have been complied with; when an instrument is one entitled to be recorded, and has been duly exe-

persons claiming through him, as was held in Cogan v. Cook, 22 Minn. 137. The statutes in most states contain an express provision concerning the recording of absolute deeds accompanied by a defeasance.

[1] Partridge v. Smith, 2 Biss. 183, 185, 186; Galway v. Malchow, 7 Neb. 285; Herman v. Deming, 44 Conn. 124; Murphy v. Hendricks, 57 Ind. 593; Thorp v. Merrill, 21 Minn. 336; Sanger v. Craigue, 10 Vt. 555; Brotherton v. Livingston, 3 Watts & S. 334; Banks v. Ammon, 3 Casey, 172; Mundy v. Vawter, 3 Gratt. 518; Lally v. Holland, 1 Swan, 396; Martindale v. Price, 14 Ind. 115; Rodgers v. Kavanaugh, 24 Ill. 583; Nelson v. Wade, 21 Iowa, 49; Jones v. Bamford, 21 Id. 217. In Patridge v. Smith, *supra*, a deed was recorded in a county where the land conveyed was situated. The description was erroneous in some important particulars; but there were no other premises in the county which *at all* answered to the description. The court, while admitting the general rule as stated in the text, held that there was sufficient in the record to put a subsequent purchaser on an inquiry, and it therefore operated as a notice that the land had been conveyed. See, also, Thornhill v. Burthe, 29 La. An. 639; Slater v. Breese, 36 Mich. 77; Shepard v. Shepard, 36 Id. 173; Boon v. Pierpont, 28 N. J. Eq. 7, which are illustrations of mistakes and omissions immaterial because the other portions of the description are reasonably sufficient to enable any one to identify the land. Slater v. Breese, is an especially instructive decision on this point.

[2] Youngs v. Wilson, 27 N. Y. 351; reversing S. C., 24 Barb. 510; Babcock v. Bridge, 29 Id. 427; Bell v. Fleming, 1 Beas. 13, 490; Pettibone v. Griswold, 4 Conn. 158, Hart v. Chalker, 14 Id. 77; Viele v. Judson, 82 N. Y. 32 (record of an assignment of a mortgage).

[3] Ladley v. Creighton, 70 Pa. St. (20 P. F. Sm.) 490. Unless the recording is done in pursuance of the express provisions of a statute permitting a copy to be proved and recorded when the original is lost.

cuted and acknowledged or proved, and has been recorded in the proper manner and in the proper county, then such record becomes a constructive notice, not only of the fact that the instrument exists, but of its contents, and of all the estates, rights, titles, and interests, legal and equitable, created or conferred by it or arising from its provisions.[1] The inquiry therefore remains, to what classes of persons does this notice extend?

§ 656. (5) **To Whom the Record is a Notice.**—What classes of persons are thus charged with constructive notice by a regular and lawful registration? The answer to this question must depend upon the language of the recording acts. While the terms of the various state statutes may differ, in respect to this matter, in some of their subordinate and qualifying phrases, they all agree in the main and substantial provision; they all declare that an unrecorded conveyance is invalid only as against *subsequent* purchasers or incumbrancers; and as a necessary inference that the record only operates as a notice to the same persons.[2] In several of the statutes the qualification is added that the subsequent purchaser, who is thus protected, must be one "in good faith and for a valuable consideration;" in many of them this language is absent; but whether expressed or omitted by the legislature, it has uniformly entered into and formed a part of the judicial interpretation. In some instances "creditors" are expressly added.

§ 657. **Not to Prior Parties.**—It is a fundamental proposition, therefore, established with complete unanimity, that a registration properly made does not operate as constructive notice to all the world, but only to those persons who, under the policy of the legislation, are compelled to search the records

[1] Bancroft v. Consen, 13 Allen, 50; Orvis v. Newell, 17 Conn. 97; Bush v. Golden, 17 Id. 594; Harrison v. Cachelin, 23 Mo. 117, 127; Mesick v. Sunderland, 6 Cal. 297; George v. Kent, 7 Allen, 16; Hetherington v. Clark, 30 Pa. St. 393; Morris v. Wadsworth, 17 Wend. 103; Thomson v. Wilcox, 7 Lans. 376; Youngs v. Wilson, 27 N. Y. 351; Dimon v. Dunn, 15 Id. 498; Parkist v. Alexander, 1 Johns. Ch. 394; Humphreys v. Newman, 51 Me. 40; Hall v. McDuff, 24 Id. 311; Tripe v. Marcy, 39 N. H. 439; Leach v. Beattie, 33 Vt. 195; Bolles v. Chauncey, 8 Conn. 389; Peters v. Goodrich, 3 Id. 146; Barbour v. Nichols, 3 R. I. 187; Souder v. Morrow, 33 Pa. St. 83; Clabaugh v. Byerly, 7 Gill, 354; Grandin v. Anderson, 15 Ohio St. 286; Kyle v. Thompson, 11 Id. 616; Leiby v. Wolf, 10 Ohio, 83; Doyle v. Stevens, 4 Mich. 87; Buchanan v. International B'k, 78 Ill. 500; Ogden v. Walters, 12 Kans. 282; McCabe v. Grey, 20 Cal. 509; Dennis v. Burritt, 6 Id. 670; Montefiore v. Browne, 7 H. L. Cas. 241; Viele v. Judson, 82 N. Y. 32 (as to the effect of record of an assignment of a mortgage; it is notice of the rights of the assignee as against any subsequent acts of the mortgagee affecting the mortgage; it protects as well against a discharge as against an assignment by the mortgagee).

[2] Hunter v. Watson, 12 Cal. 363; Dennis v. Burritt, 6 Id. 670.

in order to protect their own interests.[1] It is equally well settled that such record is not notice to the holders of antecedent rights, that is, to those who have acquired their rights before the time when the record is made; and this is so even when the antecedent right may, in pursuance of the statute, be defeated by the fact of the prior record. In other words, the registration of an instrument does not act *as a notice* backwards in time.[2]

[1] See Maul v. Rider, 59 Pa. St. (9 P. F. Sm.) 167, 171. This language, often used by the courts, is, however, a vicious reasoning in a circle, and does not really determine who are charged with notice. It simply says, "those persons are affected with notice who are compelled to search the records in order to protect their own interests; and on the other hand, those persons who are charged with notice must make a search of the records." We are thus simply carried round in a circle.

[2] Birnie v. Main, 29 Ark. 591; Ward's Ex'r v. Hague, 25 N. J. Eq. (10 C. E. Green), 397; Leach v. Beattie, 33 Vt. 195; Kyle v. Thompson, 11 Ohio St. 616. There is an important difference between the operation of a registration, under the express terms of a statute, to defeat an antecedent conveyance which is unrecorded, and the effect of a registration *as a notice* which has been established by the courts as a necessary inference from these provisions of the statute. Indeed, it is solely because the registration of a conveyance *does*, in compliance with the statute, defeat a prior unrecorded title, that the record of a prior title is held to be a constructive notice to *subsequent* purchasers. As illustrations of the proposition stated in the text, see Stuyvesant v. Hall, 2 Barb. Ch. 151; Stuyvesant v. Hone, 1 Sand. Ch. 419; Taylor v. Maris' Ex'rs, 5 Rawle 51. The doctrine, and the circumstances under which it may be applied, are so well explained by the case reported in 1 Sand. Ch. and 2 Barb. Ch., *supra*, that a quotation will be instructive. The facts were briefly as follows: A tract of land was mortgaged to Stuyvesant and his mortgage was duly recorded. Hone subsequently acquired a lien thereon by a second mortgage, which he foreclosed by a suit in chancery, and the land, which had been divided into fifty-six building lots, was sold under the decree to Thorne. T. afterwards gave a mortgage upon part of these lots back to H. All the conveyances and mortgages growing out of these proceedings were duly recorded, but S. had no notice of the foreclosure suit nor of any of the proceedings. Afterwards H. foreclosed T.'s mortgage by a suit in chancery, and filed the statutory notice of *lis pendens*. During the pendency of the suit, S., who had no notice of it, released to T. forty-two of the fifty-six lots from his own (S.'s) mortgage. The fourteen lots left subject to S.'s mortgage were part of those which T. had mortgaged to H., and all of T.'s lots not mortgaged to H. were released by S. S. now brings a suit to foreclose his own mortgage, and it was claimed in defense that by his releasing the forty-two lots he had destroyed the lien of his mortgage on the remaining fourteen lots. The court held (1) that S. was not charged with constructive notice of the first suit nor of the sale under the decree in it. (2) That neither the second suit, nor the notice of *lis pendens* filed in it, operated as notice to S. (3) That the recording of the subsequent deeds to T. and of T.'s mortgages was not notice to S.; and that S. on releasing was not bound to search the records for subsequent conveyances or incumbrances. The Vice-Chancellor said on the question (1 Sandf. Ch. 419, 425): "Notice by the recording of conveyances is created by the statutes, and its effect is to be learned from their provisions, and the adjudications thereon. The statute enacts that every conveyance not recorded shall be void as against any subsequent purchaser in good faith, etc., whose conveyance shall be first recorded. Neither the provision itself nor the objects of a registry law have any reference to prior incumbrances already recorded. The effect of recording a conveyance is not retrospective, nor was it designed to

§ 658. **Only to Purchasers under Same Grantor. Effect of Perfect Record Title: Break in Record Title.**—It is not, however, every subsequent purchaser who comes within the purview of the statute. The mere fact that, subsequently to the registering of a deed of certain premises, a third person purchases the same premises from *any* source of title, from any grantor whatsoever claiming to own them, does not render the purchaser necessarily chargeable with notice of the prior recorded conveyance.[1] The only subsequent purchaser who is charged with notice of the record of a conveyance is one who claims under the same grantor from the same source of titles. If two titles to the same land are distinct and conflicting, the superiority between them depends not upon their being recorded, but upon their intrinsic merits. It is a settled doctrine, therefore, that a record is only a constructive notice to subsequent purchasers deriving title from the same grantor.[2] Inti-

change rights already vested and secured by a recorded deed or mortgage. *It simply protects a purchaser who takes the precaution to search the records, and record his own conveyance, against prior unrecorded conveyances of which he had no notice.*" The Vice-Chancellor then refers to Cheesebrough v. Millard, 1 Johns. Ch. 414, and also shows that there is nothing in the case of Guion v. Knapp, 6 Paige, 42, opposed to the conclusion at which he had arrived. This decision was affirmed by Chancellor Walworth, in 2 Barb. Ch. 151, 157, 158, and his opinion upon the question substantially repeats the reasoning of the Vice-Chancellor, that a deed subsequently made and recorded by the mortgagor is not notice to a prior mortgagee whose mortgage is on record, so that he may release part of the premises without destroying his lien. See, also, Howard Ins. Co. v. Halsey, 8 N. Y. 271; Hill v. McCarter, 27 N. J. Eq. 41; Hoy v. Bramhall, 19 Id. 563; Van Orden v. Johnson, 1 McCarter, 376; Blair v. Ward, 2 Stockt. Ch. 126; George v. Wood, 9 Allen, 80; Taylor v. Maris, 5 Rawle, 51; Leiby v. Wolf, 10 Ohio, 83; James v. Brown, 11 Mich. 25; Cooper v. Bigly, 13 Id. 463; Doolittle v. Cook, 75 Ill. 354; Iglehart v. Crane, 42 Id. 261; Deuster v. McCamus, 14 Wisc. 307; Straight v. Harris, 14 Id. 509; Halsteads v. B'k of K'y, 4 J. J. Marsh. 558.

[1] This is clearly shown by the uniform mode in which the records of deeds, mortgages, etc., are *indexed* in the public offices of record. The indexes are never arranged according to the parcels of land, so that a person making search follows the ownership of a particular parcel irrespective of the sources of title; they are always arranged according to the grantors and grantees, mortgagors and mortgagees. The records can only disclose the title to a particular tract, so far as they enable one making search to trace the ownership from one grantor or mortgagor to another. Records are only constructive notice of a title of which they enable a party to obtain *actual* notice or knowledge by means of a search.

[2] Baker v. Griffin, 50 Miss. 158; Tilton v. Hunter, 24 Me. 29; Bates v. Norcross, 14 Pick. 224; George v. Wood, 9 Allen, 80; Murray v. Ballou, 1 Johns. Ch. 566; Embury v. Conner, 2 Sandf. 98; Stuyvesant v. Hall, 2 Barb. Ch. 151, 158; Page v. Waring, 76 N. Y. 463; Cook v. Travis, 20 N. Y. 402; Farmers L. & T. Co. v. Maltby, 8 Paige, 361; Calder v. Chapman, 52 Pa. St. (2 P. F. Sm.) 359; Wood v. Farmere, 7 Watts, 282; Lightner v. Mooney, 10 Id. 412. Hetherington v. Clark, 6 Casey, 393, 395; Keller v. Nutz, 5 Serg. & R. 246; Hoy v. Bramhall, 4 Green Ch. 563; Losey v. Simpson, 3 Stockt. Ch. 246; Whittington v. Wright, 9 Ga 23; Brock v. Headen, 13 Ala. 370; Dolin v. Gardner, 15 Id. 758; Leiby v. Wolf, 10 Ohio, 80, 83; Blake v.

mately connected with, and indeed a branch of this same doctrine, is the question how far back is a purchaser bound to search the record title of his own vendor? If the records show a good title vested in the vendor at a certain date, and nothing done by him after that time to impair or incumber the title, it would seem that the policy of the registry acts is thereby accomplished; the purchaser is protected; he is not bound to inquire farther back, and to ascertain whether the vendor has done acts which may impair his title, prior to the time at which it was vested in him as indicated by the records. This view is supported by many decisions—it seems by the weight of authority—which hold that a purchaser need not prosecute a search for deeds or mortgages made by his own vendor, further back

Graham, 6 Ohio St. 580; Iglehart v. Crane, 42 Ill. 261; St. John v. Conger, 40 Id. 535; Crockett v. Maguire, 10 Mo. 34; Long v. Dollarhide, 24 Cal. 218, 453. Chan. Walworth thus states the doctrine in Stuyvesant v. Hall, *supra:* "The recording of a deed or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest or right in the property *under the grantor or mortgagor.*" While this general doctrine is accepted with complete unanimity, and is indeed essential to any just working of the registry system, there is some difference of judicial opinion in its application to particular conditions of fact. In the case which is not uncommon, where A. conveys to B., and the deed is not recorded, and B. then conveys the land to C., who puts his deed upon record, it is held in many decisions that this registration of the second deed is not a constructive notice to one who subsequently purchases from A.; both parties, it is said, do not claim under the same grantor B., and the records do not furnish any clue to the true chain of title. Roberts v. Bourne, 23 Me. 165; Harris v. Arnold, 1 R. I. 125; Cook v. Travis, 22 Barb. 338; 20 N. Y. 402; Losey v. Simpson, 3 Stockt. Ch. 246; Lightner v. Mooney, 10 Watts, 407; Calder v. Chapman, 52 Pa. St. 359; Fenne v. Sayre, 3 Ala. 478; Chicago v. Witt, 75 Ill. 211. In this last case, A., a grantee in an *unrecorded* deed, conveyed to B., and B. to C.; these two latter deeds were both recorded; but neither of them referred to A.'s deed, nor contained any recital of it. Held, that the record of these two deeds was not notice of the unrecorded deed to A. In like manner, and for a like reason, if A. conveys to B. by a deed which is not put upon record, and B. gives a mortgage on the land, even a purchase-money mortgage back to his grantor A., and this mortgage is recorded, the record, it is held, is not a constructive notice to a subsequent purchaser from A., either of the mortgage itself or of the conveyance to B. Veazie v. Parker, 23 Me. 170; Pierce v. Taylor, 23 Id. 246; Felton v. Pitman, 14 Ga. 530. It is a well-settled application of the law of estoppel that if A., having no title, conveys or mortgages to B. with covenant of title, and afterwards acquires the title, this title will inure to the benefit of B. by operation of the estoppel; and in some states the same effect is produced without any covenant of warranty. If, therefore, A. thus conveys or mortgages to B., and B.'s deed or mortgage is duly recorded, and if after A. acquired the title he gives another deed or mortgage to C., and C.'s deed or mortgage and the conveyance of title to A. are recorded together, it is settled that the estoppel binds A.'s assignee C. as well as himself, and that through the estoppel B. obtains the precedence over C. Pike v. Galvin, 29 Me. 183; Wark v. Willard, 13 N. H. 389; Kimball v. Blaisdell, 5 Id. 533; Jarvis v. Aikens, 25 Vt. 635; White v. Patten, 24 Pick. 324; Somes v. Skinner, 3 Id. 52; Tefft v. Munson, 57 N. Y. 97; Doyle v. Peerless Pet. Co., 44 Barb. 239; Farmers L. & T. Co. v. Maltby, 8 Paige, 361.

than the time at which the title is shown by the records to have been vested in such vendor; or, in other words, a purchaser is not bound by the registry of deeds or mortgages from his vendor made prior to that time.[1] The record title is so far a protection under the statutes to purchasers relying upon it, that if an instrument appearing on its face to be an absolute conveyance is recorded, a subsequent purchaser in good faith and for a valuable consideration from the grantee named in it, obtains a title free from all secret trusts, and from all outstanding equities not appearing on the record, which, if recorded or otherwise disclosed, might have shown the instrument to be in reality a mortgage.[2]

[1] Farmers' Loan Co. v. Maltby, 8 Paige, 361; Page v. Waring, 76 N. Y. 463, 467–469; Hetzel v. Barber, 69 Id. 1; Doswell v. Buchanan, 3 Leigh, 365, 381; Calder v. Chapman, 52 Pa. St. (2 P. F. Sm.) 359; Buckingham v. Hanna, 2 Ohio St. 551; Losey v. Simpson, 3 Stockt. Ch. 246. In Farmers' Loan Co. v. Maltby, *supra*, a vendee in a contract for the purchase of land which was unrecorded—the mere equitable owner—gave a mortgage on the premises to one A., which was immediately put on record. This vendee afterwards obtained the legal title by a deed from his vendor, which deed was at once recorded; he then conveyed the land to the defendant B. for a valuable consideration, and this second deed was also recorded. The court held that the recording of the mortgage to A., being prior to the time when the title as appeared by the record was vested in the mortgagor, did not operate as constructive notice to the grantee B., who took his deed after the legal title was vested in his grantor. Chan. Walworth said in substance, that as the mortgagor had not the legal title when the mortgage to A. was given, but only a contract to purchase the land from one S., it followed that the defendant B. was not charged with constructive notice by the record of such mortgage. In taking a conveyance B. would not search for mortgages by his grantor prior to the date of his deed from S. See, however, Digman v. McCollum, 47 Mo. 372, 375, 376, which appears to be in direct conflict with the rule as stated in the text, and with the foregoing cases cited in this note. It holds that a subsequent purchaser has a constructive notice of a recorded incumbrance—a mortgage—although the mortgagor's title was unrecorded and was purely equitable—*e. g.*, an unregistered agreement to convey the land. For the case where a grantee or mortgagee in good faith, and holding a record title which appears to be perfect, may really have no title, because a grantor or mortgagor in the chain of title, had knowledge of a prior unrecorded deed or mortgage, see *post*, § 760, and cases there cited. Flynt v. Arnold, 2 Metc. 619; Mahoney v. Middleton, 41 Cal. 41, 50; Fallas v. Pierce, 30 Wisc. 443; Sims v. Hammond, 33 Iowa, 368; Van Rensselaer v. Clark, 17 Wend. 25; Goelet v. McManus, 1 Hun, 306; Ring v. Richardson, 3 Keyes, 450; Schutt v. Large, 6 Barb. 373. These cases overrule the earlier decisions in Connecticut v. Bradish, 14 Mass. 296, 303; Trull v. Bigelow, 16 Id. 406; Gliddon v. Hunt, 24 Pick. 221; Ely v. Wilcox, 20 Wisc. 523, 530. See also *post*, § 761, when a purchaser may be charged with notice of a prior unrecorded conveyance, though there is a break in the chain of record title. Crane v. Turner, 7 Hun, 357; 67 N. Y. 437.

[2] For example, if a deed absolute on its face is accompanied by a written defeasance, and the deed is recorded but the defeasance is not, this rule applies; also, if such a deed is accompanied by a verbal agreement or defeasance which, in equity at least, might render it a mortgage. The same is true with a deed absolute on its face, but accompanied with such parol acts as constitute the grantee a constructive trustee, or trustee *in invitum* for the benefit of the grantor, or of some third person. Jaques v. Weeks, 7 Watts, 261, 271;

§ 659. **(6) Effect of Other Kind of Notice in the Absence of a Registration.**—May any other kind of notice, actual or constructive, supply the want of a registration? In other words, if a subsequent purchaser for a valuable consideration has put his conveyance upon record, but at the time of his purchase was affected with notice that there was a prior outstanding but unregistered conveyance of the same premises from the same grantor, would he be protected by his record notwithstanding the notice, or would the notice operate, like the constructive notice arising from a registry, to postpone his own interest to that conferred by the prior unregistered instrument? This question was presented to the English courts of chancery at an early day, and was settled by them in accordance with the general principles of equity; and their decisions have with great uniformity been adopted and followed by the American courts. It is the established doctrine that a notice, of some kind, of an existing, prior, unrecorded conveyance, operates, like the constructive notice arising from a registry, to postpone a subsequent and recorded instrument. If a subsequent purchaser, even for a valuable consideration, had received notice of a prior unrecorded instrument, then he can not acquire or retain the precedence from a registration of his own conveyance; his conveyance, though recorded, is subordinate and postponed to the prior unrecorded one of which he had received notice.[3] This conclusion, reached originally by the court of chancery, has in England furnished a rule for that tribunal alone, and has not been accepted by the courts of law;[2] in this country it is recognized and enforced alike by the courts of equity and of law, for the reason that both have jurisdiction in matters of fraud.[3] The doctrine is, in fact, a mere application of the broader general principle, that a person who purchases an es-

Orvis v. Newell, 17 Conn. 97; Bush v. Golden, 17 Id. 594; Harrison v. Cachelin, 23 Mo. 117, 126; Mesick v. Sunderland, 6 Cal. 297; Hart v. Farm. & Mech. B'k, 33 Vt. 252; Bailey v. Myrick, 50 Me. 171.

[1] This doctrine, which is nakedly stated in the text without its reasons, was settled by Lord Hardwicke (A. D. 1747), in the celebrated case of Le Neve v. Le Neve, Ambl. 436; 2 Eq. Lead. Cas. 109 (4th Am. ed.); Davis v. Earl of Strathmore, 16 Ves. 419, per Lord Eldon; Greaves v. Tofield, L. R., 14 Ch. Div. 563; Credland v. Potter, L. R., 10 Ch. 8; Rolland v. Hart, L. R., 6 Ch. 678; Chadwick v. Turner, L. R., 1 Ch. 310; Hine v. Dodd, 2 Atk. 275; Wyatt v. Barwell, 19 Ves. 435; Benham v. Keane, 3 De G. F. & J. 318; Ford v. White, 16 Beav. 120, 123, 124.

[2] Doe v. Allsop, 5 B. & Ald. 142. It must be, however, since the provision of the "Supreme Court of Judicature Act," giving the rules of equity a binding efficacy wherever they conflict with those of the law concerning the same matter, that the doctrine is now enforced in legal as well as in equitable suits by the English courts.

[3] Tuttle v. Jackson, 6 Wend. 213, 227; Britton's Appeal, 9 Wright, 172; see *post*, § 759.

tate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will be held a trustee for the benefit of the person whose right he sought to defeat.[1]

§ 660. **Fraud the Foundation of the Rule.**—In the very earliest cases which first established the rule concerning the effect of notice of a prior unregistered conveyance to a subsequent purchaser who had put his deed or mortgage upon record, the decision was expressly based upon the positively fraudulent character of the purchaser's conduct. It was said in the plainest terms, that the act of the purchaser in endeavoring to obtain a precedence through the operation of the statute, while he had knowledge or notice of the prior right held by another person, was in itself a fraud, an attempt to obtain a fraudulent advantage; and to uphold it would be suffering the statute to be used as a means of accomplishing a fraudulent purpose. The same theory has been reaffirmed by the succeeding decisions of the English courts down to the present day.[2] It is especially important in its bearing upon the question whether a constructive as well as an actual notice of a prior unregistered conveyance will affect the rights of a subsequent purchaser who has complied with the requirements of the recording acts. In fact, all of the doubt, confusion, and conflict of opinion with reference

[1] Thus a deed which for any defect does not convey the legal title, or a mortgage which is inoperative as a valid legal mortgage, may be good in equity as an agreement to convey or to mortgage, and a subsequent purchaser with notice of such an equitable right will take the property subject thereto. See Le Neve v. Le Neve, Ambl. 436, per Lord Hardwicke; Davis v. Earl of Strathmore, 16 Ves. 419, 428; Jennings v. Moore, 2 Vern. 609; Mackreth v. Symmons, 15 Ves. 349.

[2] In the leading case of Le Neve v. Le Neve, Lord Harkwicke used language which has been either quoted or approved in almost every subsequent English case. See quotation *ante*, § 591. See also Davis v. Earl of Strathmore, 16 Ves. 419; Wyatt v. Barwell, 19 Id. 435; Hine v. Dodd, 2 Atk. 275; Ford v. White, 16 Beav. 120, 123, 124; Benham v. Keane, 3 De G. F. & J. 318; Chadwick v. Turner, L. R., 1 Ch. 310, 319; Rolland v. Hart, L. R., 6 Ch. 678, 681, 684; Greaves v. Tofield, L. R., 14 Ch. Div. 563, 571, 575, 577. In Rolland v. Hart, *supra*, Lord Hatherley thus sums up the doctrine: "It is not perhaps very easy to see the exact shades of distinction between the cases; but this appears to be decided from the time of Hine v. Dodd downwards, that a mere suspicion of fraud is not enough, and there must be actual notice implying fraud in the person registering the second incumbrance to deprive him of priority thereby gained over the first incumbrance. In all these cases down to Wyatt v. Barwell, the expression is, that there must be actual notice amounting to fraud. It has been very well put, that it must be actual notice, which renders it fraudulent to attempt to obtain priority, or to advance money when knowing that another person has already advanced money upon the same security, and afterwards unrighteously to attempt to deprive him of the benefit of that security by taking advantage of the registration act." See also a passage from the opinion of Bramwell, L. J., in Greaves v. Tofield, *supra*, quoted in vol. 1, in note 2, under § 431.

to the respective effects of constructive and of actual notice in connection with registration, has arisen from the adoption of this theory, and the attempt to make it of universal application.[1] The important differences which exist in the various American statutes have already been pointed out.[2] In those states whose legislatures have employed substantially the same language which is found in the English registry acts, the courts, while adopting the rule concerning the effect of notice laid down by Lord Hardwicke in Le Neve v. Le Neve, have also adopted the reasons which he there gave for it, and have found in the fraud imputed to the subsequent purchaser its sufficient foundation. In several of the states, the precedence over a prior unregistered conveyance obtained by recording a subsequent instrument is given in express terms, only to "purchasers in good faith;" in others it is given only to purchasers "without notice," or "without actual notice."[3] Wherever such language has been employed, the rule under consideration is, of course, a necessary and direct consequence of the legislative enactment, and is not merely a judicial interpretation demanded by the general principles of equity.[4] It should be observed, in concluding this topic, that a legislature may declare that no notice, either actual or constructive, shall supply the want of a registration; that a subsequent purchaser shall acquire absolute precedence by recording his own instrument even though he had full notice of a prior unregistered conveyance: and this effect may be stated in express terms, or it may be a necessary inference from the whole scope of the statute.[5]

§ 661. **(7) What Kind of Notice is Sufficient to Produce this Effect.**—The doctrine being thus established in England and throughout this country, that some notice of a prior unregistered conveyance may supply the want of a registration, the inquiry finally remains, what species or amount of notice will avail to produce this effect? Or to put the question in its most practical form, whether an *actual* notice is requisite, or whether a *constructive* notice may also be sufficient? It is plain, if the theory is accepted in its full and literal sense, that the positive *fraud* of the subsequent purchaser in endeavoring to

[1] See *post*, §§ 662-664.

[2] See *ante*, § 646, and abstracts of statutes in note thereunder.

[3] See *ante*, in note under § 646.

[4] See cases cited *ante*, in note under § 659.

[5] Such, in fact, appears to be the construction given to the peculiar language of one or two state statutes. See White v. Denman, 1 Ohio St. 110; 16 Ohio, 59; Bloom v. Noggle, 4 Ohio St. 45; Holliday v. Franklin B'k, 16 Ohio, 533; Stansell v. Roberts, 13 Id. 148; Jackson v. Luce, 14 Id. 514; Mayham v. Coombs, 14 Id. 428.

obtain a precedence by registering his own instrument while he has notice of the prior conveyance, is the sole foundation of the doctrine, that it is difficult to escape from the conclusion that the notice which shall thus render his conduct fraudulent, and destroy the efficacy of his registration, must be an actual one. It is not in accordance with general principles to pronounce a person guilty of fraud by reason of knowledge constructively imputed to him, knowledge which he may, in fact, never have acquired, but which he is, from considerations of policy, *presumed* to have acquired, treated as having acquired.

§ 662. **English Rule.**—The earlier English decisions, adopting the theory of the second purchaser's fraud in all its features, accepted without hesitation the logical results of this theory with reference to the kind of notice. They not only held affirmatively that the notice must be actual, and proved by clear, positive, and direct evidence, but negatively that a constructive notice was not sufficient. The same rule has even been repeated by way of a *dictum* in one or two of the very latest decisions.[1] In the modern English cases, the judges, while still insisting upon fraud as the sole basis of the doctrine, hold that the same effect may be produced by a constructive notice as by an actual one upon a subsequent purchaser who has registered his conveyance. The inquiry no longer seems to be whether the notice was actual or constructive, but whether the evidence was sufficiently definite, and the circumstances were sufficient to affect the conscience of the purchaser as a fact, and not merely as a possible inference.[2]

§ 663. **American Rules.**—The same diversity and fluctuation of opinion appear among the decisions made by the courts of

[1] Hine v. Dodd, 2 Atk. 275; Jolland v. Stainbridge, 3 Ves. 478; Wyatt v. Barwell, 19 Id. 435; Chadwick v. Turner, L. R., 1 Ch. 310, 319.

[2] In Rolland v. Hart, L. R., 6 Ch. 678, 681–683, a second mortgagee was held to be affected with notice of a prior unregistered mortgage, by means of information or knowledge obtained by his attorney in the transaction, although it appeared very clearly that the knowledge had not in fact been communicated by the attorney to his client. It is true the court called the notice "actual;" but to treat such notice imputed to a principal on account of information acquired by an agent as actual, is to disregard the essential distinction between the two species. A subsequent purchaser whose conveyance was registered, has been charged with notice of a prior equitable mortgage arising from the non-production of title-deeds, and his failure to inquire for them. Wormald v. Maitland, 35 L. J. Ch. (N. S.) 69; *In re* Allen, 1 I. R. Eq. 455; and see Whitehead v. Jordan, 1 Y. & C. 303. When a subsequent purchaser or incumbrancer for a valuable consideration has paid or parted with the consideration without any notice of a prior unregistered deed or mortgage, and then registers his own instrument after obtaining such notice, the notice does not defeat the precedence acquired under the statute by his registration. Elsey v. Lutyens, 8 Hare, 159; Essex v. Baugh, 1 Y. & C. Ch. 620.

the various states, and in some instances between the earlier and later decisions of the same court. In one class of cases, an actual notice rendering the second purchaser's conduct positively fraudulent, is held to be essential. In another class, no distinction, in respect to the operation of notice, is recognized between the subsequent purchaser under the recording acts and any other subsequent purchaser; the rights of both are treated as being equally affected by a constructive notice.[1] Two causes have operated to produce this conflict. It has resulted in part from the different terms which the legislatures of various states have employed in the most important clauses of the recording acts.[2] It has resulted in greater part I think, from a lack of unanimity in the meanings given by the courts to "actual" and to "constructive" notice respectively; from a confusion and misconception with respect to the essential distinctions which exist between the two species. The conflict is, therefore, more apparent than real.

§ 664. **Actual or Constructive Notice.**—As this question is one which depends, in great measure, upon the local law, either local statutes or decisions, I have placed in the foot-note cases selected from all the states, and representing both types of legislation and of judicial interpretation; one class embracing those in which an actual notice is required; the other, those in which a constructive notice is sufficient.[3] While the rule is settled

[1] See Dey v. Dunham, 2 Johns. Ch. 182, 190; Dunham v. Dey, 15 Johns. 555; Jackson v. Van Valkenburg, 8 Cow. 260; Tuttle v. Jackson, 6 Wend. 213; Grimstone v. Carter, 3 Paige, 421; Williamson v. Brown, 15 N. Y. 354; Norcross v. Widgery, 2 Mass. 505; McMechan v. Griffing, 3 Pick. 149; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; General Life Ins. Co. v. U. S. Ins. Co., 10 Md. 517, 525; Fleming v. Burgin, 2 Ired. Eq. 584; Noyes v. Hall, 7 Otto, 34, 38; Cabeen v. Breckenridge, 48 Ill. 91; Truesdale v. Ford, 37 Id. 210; Brinkman v. Jones, 44 Wisc. 498, 519; White v. Foster, 102 Mass. 375; Lamb v. Pierce, 113 Id. 72; Crassen v. Swoveland, 22 Ind. 427, 434; Wilson v. Hunter, 30 Id. 466, 472; Lawton v. Gordon, 37 Cal. 202, 205; Maupin v. Emmons, 47 Mo. 304, 306; Brown v. Volkening, 64 N. Y. 76, 82. These cases, taken from a large number of similar ones, sufficiently show the diversity and fluctuation of opinion among the American decisions spoken of in the text.

[2] As has been shown in a former paragraph (§ 646), there are several distinct types of the statute. These changes in the language of the statutes have naturally affected their judicial interpretation. See Williamson v. Brown, 15 N. Y. 354.

[3] For classification and abstract of the state statutes, and some further decisions under them, see note *ante*, § 646. I have, in the present note, selected and arranged well-considered and authoritative cases from nearly every state. It would be impossible, within any reasonable limits, to make a strict classification of decisions which *require* actual notice properly so called, and those which permit constructive notice. There is a great confusion or uncertainty as to what particular kinds are embraced within these *genera*. In nearly all the states whose statutes in terms demand an "actual" notice, the courts admit the operation of those species which are uniformly regarded as belonging to the *genus* constructive, viz., notice

in all the states composing the first class, that, in order to postpone a subsequent purchaser or incumbrancer who has obtained the first record, he must have received an actual notice of a prior unrecorded instrument, it is equally well settled that this notice need not be established by direct and positive evidence; it may be shown by indirect evidence, by proof of circumstances sufficient to put any reasonably prudent man upon an inquiry. Indeed, in some of the states where an actual notice is expressly demanded by statute, it has been decided that open and notorious possession under a prior unrecorded conveyance constitutes a sufficient notice. In the states composing the second class the rule admitting the sufficiency of a constructive notice

arising from *lis pendens*, recitals in title papers, between principal and agent, and even possession. The courts of the same states hold that the "actual" notice of the statute does not mean knowledge, and may be shown by any kind of circumstances which would put a reasonable man upon an inquiry. Practically, it seems very difficult to distinguish "actual" notice so defined, from constructive notice. See upon this subject the able opinion of Taylor, J., in Brinkman v. Jones, 44 Wisc. 498, 519, and Maupin v. Emmons, 47 Mo. 304, 306. The courts of a few states have interpreted their statutes more literally, and have established a more stringent rule requiring an actual notice proved by direct evidence. Of this class are Massachusetts, Maine, Missouri, and perhaps Maryland and Indiana. I have arranged the cases by states, and have placed together those in each state which treat of notice by *possession*. From the decisions here collected, taken in connection with the abstract of statutes and further cases in the note under § 646, I hope that the reader will be able to form an accurate notion of the law on this confused subject as it is settled in each commonwealth.

Alabama.—Lambert v. Newman, 56 Ala. 623, 625; Corbett v. Clenny, 52 Id. 480, 483; Dudley v. Witter, 46 Id. 664, 694; Campbell v. Roach, 45 Id. 667; Ponder v. Scott, 44 Id. 241, 244; Newsome v. Collins, 43 Id. 656, 663; Burch v. Carter, 44 Id. 115, 117; Witter v. Dudley, 42 Id. 616, 621; Wyatt v. Stewart, 34 Id. 716; Boyd v. Beck, 29 Id. 703; Johnson v. Thweatt, 18 Id. 741; Dearing v. Watkins, 16 Id. 20; Walter v. Rhea, 10 Id. 451; 12 Id. 646; Boyd v. Beck, 29 Id. 703; De Vandal v. Malone's Ex'rs, 25 Id. 272; Center v. P. & M. B'k, 22 Id. 743; Hoole v. Att'y-Gen., 22 Id. 190; Smith's Heirs v. Branch B'k, 21 Id. 125. *Possession*—Chapman v. Holding, 60 Ala. 522; Bernstein v. Humes, 60 Id. 582; Lindsey v. Veasy, 62 Id. 421.

Arkansas.—Stidham v. Mathews, 29 Ark. 650, 659; Holman v. Patterson's Heirs, 29 Id. 357; Haskell v. The State, 31 Id. 91. *Possession*—Byers v. Engles, 16 Id. 543.

California.—Lawton v. Gordon, 37 Cal. 202; Galland v. Jackman, 26 Id. 79, 87. *Possession*—Jones v. Marks, 47 Cal. 242, 248; Fair v. Stevenot, 29 Id. 486; O'Rourke v. O'Connor, 39 Id; 442; Smith v. Yule, 31 Id. 180; Thompson v. Pioche, 44 Id. 508, 516; Moss v. Atkinson, 44 Id. 3, 17.

Connecticut.—Blatchley v. Osborn, 33 Conn. 226, 233; Clark v. Fuller, 39 Id. 238; B'k of New Milford v. New Milford, 36 Id. 94; Sigourney v. Munn, 7 Id. 324; Hamilton v. Nutt, 34 Id. 501; Bush v. Golden, 17 Id. 594; Wheaton v. Dyer, 15 Id. 307.

Florida.—*Possession*, Doe v. Roe, 13 Flor. 602.

Georgia.—Virgin v. Wingfield, 54 Ga. 451, 454; Bryant v. Booze, 55 Id. 438; Poulet v. Johnson, 25 Id. 403; Downs v. Yonge, 17 Id. 295; Seabrook v. Brady, 47 Id. 650; Brown v. Wells, 44 Id. 573, 575; Williams v. Adams, 43 Id. 407; Allen v. Holden, 32 Id. 418; Allen v. Holding, 29 Id. 485; Lee v. Cato, 27 Id. 637; Doe v. Roe, 25 Id. 55. *Possession*—Helms v. May, 29 Id. 121; Wyatt v. Elam, 19 Id. 335.

Illinois.—Frye v. Partridge, 82 Ill. 267, 270; Chicago etc. R. R. v. Kennedy, 70 Id. 350, 361; Redden v. Miller, 95 Id. 336; Shepardson v.

is well established. To constitute such a notice under the recording acts, it must be shown by evidence clear and reliable that the party has received information of facts and circumstances which are sufficient, *in contemplation of law*, to put any reasonably prudent man upon an inquiry, so that the inquiry, if prosecuted with due diligence, would lead to a discovery of

Stevens, 71 Id. 646; Erickson v. Rafferty, 79 Id. 209, 212; Chicago v. Witt, 75 Id. 211; Morris v. Hogle, 37 Id. 150; Dunlap v. Wilson, 32 Id. 517; Ogden v. Haven, 21 Id. 57. *Possession*—Noyes v. Hall, 7 Otto (U. S.), 34, 38; Tunison v. Chamblin, 88 Ill. 378, 390; Ill. Cent. R. R. v. McCullough, 59 Id. 166; Warren v. Richmond, 53 Id. 52; Bayles v. Young, 51 Id. 127; Bogue v. Williams, 48 Id. 371; Cabeen v. Breckenridge, 48 Id. 91; Truesdale v. Ford, 37 Id. 210; McVey v. McQuality, 97 Id. 93; Partridge v. Chapman, 81 Id. 137; Lumbard v. Abbey, 73 Id. 177.

Indiana.—Crassen v. Swoveland, 22 Ind. 427, 432; Wiseman v. Hutchinson, 20 Id. 40; Croskey v. Chapman, 26 Id. 333; Wilson v. Hunter, 30 Id. 466, 472; Paul v. Connersville etc. R. R., 51 Id. 527, 530; Kirkpatrick v. Caldwell's Adm'rs, 32 Id. 299; Brose v. Doe, 2 Id. 666; Ricks v. Doe, 2 Blackf. 346. *Possession*—Clouse v. Elliott, 71 Id. 302; Campbell v. Brackenridge, 8 Blackf. 471.

Iowa.—Smith v. Denton, 42 Iowa, 48; Watson v. Phelps, 40 Id. 482; Blanchard v. Ware, 43 Id. 530; 37 Id. 305; Jones v. Bamford, 21 Id. 217; Mitchell v. Peters, 18 Id. 119; Wilson v. Miller, 16 Id. 111; Hopping v. Burnam, 2 Id. 39. *Possession*—Rogers v. Hussey, 36 Id. 664; Phillips v. Blair, 38 Id. 649; Hubbard v. Long, 20 Id. 149; Baldwin v. Thompson, 15 Id. 504; Moore v. Pierson, 6 Id. 279.

Kansas.—Jones v. Lapham, 15 Kans. 540, 545; Setter v. Alvey, 15 Id. 157; Kirkwood v. Koester, 11 Id. 471. *Possession*—Johnson v. Clark, 18 Id. 157, 164; School Dist. v. Taylor, 19 Id. 287; Greer v. Higgins, 20 Id. 420; Lyons v. Bodenhamer, 7 Id. 455.

Kentucky.—Mueller v. Engeln, 12 Bush, 441, 444; Hardin v. Harrington, 11 Id. 367; Hopkins v. Garrard, 7 B. Mon. 312; Forepaugh v. Appold, 17 Id. 631; Vanmeter v. McFaddin, 8 Id. 442; Honore v. Bakewell, 6 Id. 67; Thornton v. Knox, 6 Id. 74; Johnston v. Gwathmey, 4 Litt. 317. *Possession*—Russell v. Moore, 3 Metc. 437; Hackwith v. Damron, 1 Mon. 235.

Louisiana.—Moore v. Jourdan, 14 La. An. 414; Smith v. Lambeth, 15 Id. 566; Swan v. Moore, 14 Id. 833; Bell v. Haw, 8 Mar. N. S. 243. *Possession*—Winston v. Prevost, 6 La. An. 164; Splane v. Mitcheltree, 2 Id. 265.

Maine.—Hull v. Noble, 40 Me. 459, 480; Goodwin v. Cloudman, 43 Id. 577; Rich v. Roberts, 48 Id. 548; Porter v. Sevey, 43 Id. 519; Merrill v. Ireland, 40 Id. 569; Hanley v. Morse, 32 Id. 287; Spofford v. Weston, 29 Id. 140; Butler v. Stevens, 26 Id. 484; Kent v. Plummer; 7 Id. 464; Webster v. Maddox, 6 Id. 256.

Maryland.—Green v. Early, 39 Md. 223, 229; In matter of Leiman, 32 Id. 225; Gen. Life Ins. Co. v. U. S. Ins. Co. 10 Id. 517, 526; Mayor etc. v. Williams, 6 Id. 235; Johns v. Scott, 5 Id. 81; Winchester v. Balt. etc. R. R., 4 Id. 231; Price v. McDonald, 1 Id. 403; Baynard v. Norris, 5 Gill, 483; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 385.

Massachusetts.—Lamb v. Pierce, 113 Mass. 72; Connihan v. Thompson, 111 Id. 270; White v. Foster, 102 Id. 375; Sibley v. Leffingwell, 8 Allen, 584; George v. Kent, 7 Id. 16; Dooley v. Wolcott, 4 Id. 406; Parker v. Osgood, 3 Id. 487; Buttrick v. Holden, 13 Metc. 355, 357; Curtis v. Mundy, 3 Id. 405; Lawrence v. Stratton, 6 Cush. 163, 166; Hennessey v. Andrews, 6 Id. 170; Mara v. Pierce, 9 Gray, 306; Pingree v. Coffin, 12 Id. 288.

Michigan.—Reynolds v. Ruckman, 35 Mich. 80; Munroe v. Eastman, 31 Id. 283; Shotwell v. Harrison, 30 Id. 179; Barnard v. Campau, 29 Id. 162; Baker v. Mather, 25 Id. 51; Case v. Erwin, 18 Id. 434; Fitzhugh v. Barnard, 12 Id. 105; Waldo v. Richmond, 40 Id. 380; Stetson v. Cook, 39 Id. 750; Hosley v. Holmes, 27 Id. 416. *Possession*—Russell v. Sweezey, 22 Id. 235, 239; Hommel v. Devinney, 39 Id. 522.

Minnesota.—Coy v. Coy, 15 Minn. 119, 126; Roberts v. Grace, 16 Id.

the truth. A constructive notice, under this system, can never be a matter of mere possible inference; there must be enough brought home to the knowledge of the party, to impose a duty upon his conscience according to the theory of equity jurisprudence. Subject to this general limitation, the constructive notice, under the recording statutes, may arise in any of the

126; Ross v. Worthington, 11 Id. 438; Doughaday v. Paine, 6 Id. 443. *Possession*—Smith v. Gibson, 15 Minn. 89, 99; Morrison v. March, 4 Id. 422; Seagar v. Burns, 4 Id. 141; Minor v. Willoughby, 3 Id. 225.

Mississippi.—Allen v. Poole, 54 Miss. 323; Wasson v. Connor, 54 Id. 351; Deason v. Taylor, 53 Id. 697, 701; Loughridge v. Bowland, 52 Id. 546, 553; Buck v. Paine, 50 Id. 648, 655; Avent v. McCorkle, 45 Id. 221; Parker v. Foy, 43 Id. 260; McLeod v. First Nat. B'k, 42 Id. 99, 112. *Possession*—Strickland v. Kirk, 51 Id. 795, 797; Perkins v. Swank, 43 Id. 349, 361.

Missouri.—Maupin v. Emmons, 47 Mo. 304, 306; Real Est. Sav. Inst. v. Collonious, 63 Id. 290, 294; Ridgway v. Holliday, 59 Id. 444; Eck v. Hatcher, 58 Id. 235; Fellows v. Wise, 55 Id. 413, 415; Major v. Bukley, 51 Id. 227, 231; Digman v. McCollum, 47 Id. 372, 375; Speck v. Riggin, 40 Id. 405; Muldrow v. Robison, 58 Id. 331; Rhodes v. Outcalt, 48 Id. 367; Roberts v. Moseley, 64 Id. 507; Masterson v. West End etc. R. R., 5 Mo. App. R. 64. *Possession*—Shumate v. Reavis, 49 Mo. 333; Beatie v. Butler, 21 Id. 313.

Nebraska. — *Possession* — Uhl v. May, 5 Neb. 157.

Nevada.—Grellett v. Heilshorn, 4 Nev. 526; Gilson v. Boston, 11 Id. 413; Hardy v. Harbin, 4 Sawyer (U. S.), 536; Norton v. Meader, 8 Id. 603.

New Hampshire.—Warner v. Swett, 31 N. H. 332; Rogers v. Jones, 8 Id. 264; Colby v. Kenniston, 4 Id. 262; Patten v. Moore, 32 Id. 382, 384; Hoit v. Russell, 56 Id. 559; Bell v. Twilight; 22 Id. 500; Brown v. Manter, 22 Id. 468. *Possession*—B'k of Newberry v. Eastman, 44 N. H. 431; Hadduck v. Wilmarth, 5 Id. 181.

New Jersey.—Van Keuren v. Cent. R. R., 38 N. J. L. (9 Vroom), 165, 167 (possession); Raritan Water Co. v. Veghte, 21 N. J. Eq. (6 C. E. Green), 463, 478; 19 Id. (4 Id.) 142; Hoy v. Bramhall, 19 Id. (4 Id.) 563; Holmes v. Stout, 2 Stockt. 419; S. C., 3 Green Ch. 402; Van Doren v. Robinson, 16 N. J. Eq. (1 C. E. Green) 256; Smith v. Vreeland, 16 Id. 199; Smallwood v. Lewin, 2 McCart. 60. *Possession*—Losey v. Simpson, 3 Stockt. 246; Coleman v. Barklew, 3 Dutch. 357.

New York.—Griffith v. Griffith, 1 Hoff. Ch. 153; Williamson v. Brown, 15 N. Y. 354; Cambridge Val. B'k v. Delano, 48 Id. 326, 336, 339; Acer v. Westcott, 46 Id. 384; Gibert v. Peteler, 38 Id. 165; Howard Ins. Co. v. Halsey, 8 Id. 271; Page v. Waring, 76 Id. 463; Acer v. Westcott, 1 Lans. 193, 197. *Possession*—Brown v. Volkening, 64 N. Y. 76, 82; Westbrook v. Gleason, 79 Id. 23.

Ohio.—Morris v. Daniels, 35 Ohio St. 406; McKinzie v. Perrill, 15 Id. 162.

Oregon.—Carter v. City of Portland, 4 Oreg. 339, 350; Stannis v. Nicholson, 2 Id. 332. *Possession*—Bohlman v. Coffin, 4 Id. 313.

Pennsylvania.—Butcher v. Yocum, 61 Pa. St. (11 P. F. Sm.) 168, 171; Lahr's App. 90 Pa. St. 507; Parke v. Neeley, 90 Id. 52; Maul v. Rider, 59 Id. (9 Id.) 167, 171; Nice's Appeal, 54 Id. (4 Id.) 200; York Bank's App., 12 Casey, 458; Smith's App., 11 Wright, 128; Britton's App., 9 Id. 172; Speer v. Evans, 11 Id. 141; Ripple v. Ripple, 1 Rawl. 386. *Possession*—Krider v. Lafferty, 1 Whart. 303; Randall v. Silverthorn, 4 Barr. 173; Meehan v. Williams, 48 Pa. St. 238; Sailor v. Hertzog, 4 Whart. 259; Lightner v. Mooney, 10 Watts, 407.

Rhode Island. — Tillinghast v. Champlin, 4 R. I. 173, 215; Harris v. Arnold, 1 Id. 125.

South Carolina.—Wallace v. Craps, 3 Strobh. 266; Martin v. Sale, 1 Bailey Eq. 1, 24; City Council v. Page, 1 Speer Eq. 159, 212; Cabiness v. Mahon, 2 McCord, 273.

Tennessee.—Murrell v. Watson, 1 Tenn. Ch. 342; Tharpe v. Dunlap, 4 Heisk. 674, 686.

Texas.—Littleton v. Giddings, 47 Tex. 109; Willis v. Gay, 48 Id. 463; Allen v. Root, 39 Id. 589; Rodgers v. Burchard, 34 Id. 441. *Possession*—Watkins v. Edwards, 23 Id. 443; Ponton v. Ballard, 24 Id. 619; Mullins v.

modes recognized by the settled doctrines of equity, from extraneous facts putting one upon an inquiry, from possession, from *lis pendens*, from recitals in title papers, from information communicated to an agent.

§ 665. **Rationale of Notice in Place of a Record.**—I shall conclude this subject by an attempt to ascertain the true *rationale* of the rule concerning notice as a substitute for an actual registration. If the fraud of the second purchaser is adopted as the only explanation, it seems impossible to hold with consistency that anything less than actual notice, or even actual knowledge, of the prior conveyance, acquired by him, should avail in place of the record. We have seen, however, that the vast majority of the decisions, even while nominally requiring an actual notice, do not demand actual knowledge, but are satisfied with a notice proved by indirect evidence and inferred from circumstances. Is fraud, then, a necessary or even proper foundation upon which to base the rule in all its applications? I submit that it is not, and think that there is one other *rationale* which fully explains the doctrine in all of its phases, and which produces a real harmony among all the decisions. It should be remembered, and the fact is very important in its bearing upon this discussion, that the English statutes do not speak of the registry as constituting any notice, nor has the rule which makes it a constructive notice, ever been adopted in England. The statutory language was peremptory, that every unregistered conveyance should be deemed fraudulent and void as against a subsequent purchaser who had complied with the statute. The English judges, in the earliest decisions, were required to find some reason or excuse, in the settled principles of equity, for evading and disregarding this manda-

Wimberly, 50 Id. 457, 464; Hawley v. Bullock, 29 Id. 216; Mainwarring v. Templeman, 51 Id. 205.

Vermont.—Blaisdell v. Stevens, 16 Vt. 179; Stafford v. Ballou, 17 Id. 329; Corliss v. Corliss, 8 Id. 373; Brackett v. Wait, 6 Id. 411. *Possession*—Griswold v. Smith, 10 Id. 452; Shaw v. Beebe, 35 Id. 205; Pinney v. Fellows, 15 Id. 525.

Virginia.—Wood v. Krebbs, 30 Gratt. 708; Burwell's Ex'rs v. Fauber, 21 Id. 446; Long v. Weller's Ex'rs, 29 Id. 347; Cordova v. Hood, 17 Wall. (U. S.) 1; Brush v. Ware, 15 Pet. (U. S.) 93, 114; Vest v. Michie, 31 Gratt. 149; Mundy v. Vawter, 3 Id. 518; McClure v. Thistle, 2 Id. 182; Doswell v. Buchanan's Ex'rs, 3 Leigh, 394; Newman v. Chapman, 2 Rand. 93.

West Virginia.—Cox v. Cox, 5 W. Va. 335. *Possession*—Western etc. Co. v. Peytona C. Coal Co., 8 W. Va. 406.

Wisconsin.—Brinkman v. Jones, 44 Wisc. 498, 519; Helms v. Chadbourne, 45 Id. 60, 71, 73; Pringle v. Dunn, 37 Id. 449, 460; Hoppin v. Doty, 25 Id. 573, 591; Gilbert v. Jess, 31 Id. 110; Ely v. Wilcox, 20 Id. 523; Fallass v. Pierce, 30 Id. 443; Hoxie v. Price, 31 Id. 82. *Possession*—Wickes v. Lake, 25 Id. 71; Fery v. Pfeiffer, 18 Id. 510. It will be remembered that in Ohio and North Carolina, under the construction given to the recording acts, no notice can take the place of a record.

tory language. This reason and excuse they found in the theory of fraud imputed to the second purchaser who attempted to gain a preference by registering although he had notice of the prior right. But in the very case of Le Neve v. Le Neve, where Lord Hardwicke first formulated this theory of imputed fraud, the purchaser was charged with notice simply because his agent in the transaction had received information, *which was not in fact communicated to the principal.* The purchaser's conduct was thus pronounced fraudulent, although he had personally no knowledge of the prior conveyance, and had acted in perfect good faith, and the notice to him was in every respect constructive. It seems, therefore, to be using an inconsistent or else unmeaning formula, to speak of fraud as the essential foundation of the rule, and at the same time to hold purchasers chargeable with notice of a prior right when they have not received the slightest information of its existence—as for example, when they have been affected with notice by a *lis pendens,* by a recital in a title-deed, which perhaps they never saw or heard of, or even by the possession of a stranger. Throughout the United States the doctrine is settled that the registration of an instrument in pursuance of the recording acts, operates as a constructive notice to all subsequent purchasers. Whatever be the language of any state statute, this result of a registration—that it should be a constructive notice—is uniformly regarded as the most important object of the entire legislation, the final purpose for which the whole system of recording was established. By this American doctrine, the constructive notice given by a registration stands on exactly the same footing, produces the same effects, and is of the same nature, as any other species of absolute constructive notice recognized by equity—as for example, that arising from a *lis pendens* or from a recital, or that operating upon a principal through his agent. In all these instances the notice is a conclusive presumption of the law, and it is immaterial whether or not any information of the prior right was actually brought home to the consciousness of the party affected thereby. As, therefore, the one important and necessary effect of a registration, in pursuance of the American statutes, is to create and impose upon subsequent purchasers a constructive notice of a recorded instrument, it seems to be the natural and inevitable consequence of this view, that any other species of notice, either constructive or actual, should, in the absence of a record, produce the same effect upon the rights of a subsequent purchaser. The registration of an instrument is

a constructive notice; and this result was the main design of the legislation. It is, therefore, natural, just, and equitable, that if a subsequent purchaser has received any other kind of notice, actual or constructive, the same effect upon his rights should be produced as would have followed from the single species of constructive notice occasioned by the statute. In this manner, all kinds of constructive notice are, with respect to their effects upon the rights of subsequent purchasers, harmonized and placed upon the same footing. In my opinion, this view furnishes a complete, adequate, and true *rationale* of the doctrine under discussion. It dispenses with the notion of fraud, as a necessary element, which in very many admitted instances of notice, must be a mere figment of judicial logic; it avoids all the inconsistences which are incidents of that notion; and finally it accords with the intent and purpose of the recording acts as recognized by the vast majority of American decisions.

§ 666. **7. That between Principal and Agent—General Rule.**—The general rule is fully established, that notice to an agent in the business or employment which he is carrying on for his principal, is a constructive notice to the principal himself, so far as the latter's rights and liabilities are involved in or affected by the transaction. This rule alike includes and applies to the positive information or knowledge obtained or possessed by the agent in the transaction, and to actual or constructive notice communicated to him therein.[1] The *rationale*

[1] Le Neve v. Le Neve, Ambl. 436; 2 Eq. Lead. Cas. 109, 133 (4th Am. ed.); Saffron etc. Soc. v. Rayner, L. R., 14 Ch. Div. 406; *Ex parte* Larking, 4 Id. 566; Boursot v. Savage, L. R., 2 Eq. 134, 142; Atterbury v. Wallis, 8 De G. M. & G. 454; Rickards v. Gledstanes, 3 Giff. 298; Dryden v. Frost, 3 My. & Cr. 670; Kennedy v. Green, 3 My. & K. 699; Tunstall v. Trappes, 3 Sim. 301, 305; Sheldon v. Cox, 2 Eden, 224; Newstead v. Searles, 1 Atk. 265; Allen v. Poole, 54 Miss. 323; Suit v. Woodhall, 113 Mass. 391; Owens v. Roberts, 36 Wisc. 258; Distilled Spirits, 11 Wall. 356; Astor v. Wells, 4 Wheat. 466; Griffith v. Griffith, 9 Paige, 315; 1 Hoff. Ch. 153; Westervelt v. Haff, 2 Sandf. Ch. 98; Jackson v. Leek, 19 Wend. 339; Hovey v. Blanchard, 13 N. H. 145; Jones v. Bamford, 21 Iowa, 217; Myers v. Ross, 3 Head, 59; Holden v. N. Y. & Erie B'k, 72 N. Y. 286; Ames v. N. Y. Union Ins. Co., 14 N. Y. 253; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Russell v. Sweezey, 22 Mich. 235; National Security B'k v. Cushman, 121 Mass. 490; Smith v. Denton, 42 Iowa, 48; First National B'k of Milford v. Town of Milford, 36 Conn. 93; Tagg v. Tenn. Nat. Bk., 9 Heisk. 479; Farrington v. Woodward, 82 Pa. St. 259; Ward v. Warren, 82 N. Y. 265. The very recent case of Saffron etc. Soc. v. Rayner, *supra*, is a very important decision, showing the tendency of the courts not to extend the species of constructive notice, and especially how far the rule applies to solicitors or attorneys at law employed by a client in purely professional legal business. The decision is so important that I shall quote passages from the opinions. The plaintiff had taken a mortgage from the devisees (the *cestuis que trustent* ultimately entitled) of a certain

of the rule has been differently stated by different judges; by some it has been rested entirely upon the presumption of an actual communication between the agent and his principal; by others, upon the legal conception that for many purposes the agent and principal are regarded as one. Whatever explanation be adopted as the true one, the rule itself is both unquestionable and necessary; the ordinary business affairs of life could not be safely conducted without it.[1]

interest in a testator's estate, and gave notice of the mortgage to a firm of solicitors who were acting as attorneys for the executors and trustees under the will in a chancery suit to which the testator had been a party, and who were employed generally by such trustees in all matters relating to the testator's estate in which professional assistance was necessary. The notice to these attorneys was very clear and complete, and was clearly proved. The only question was, whether it operated as constructive notice to the principals—that is, the trustees and executors, so as to bind them. The court of appeal held that it did not, reversing the decision of the court below, which is reported in L. R., 10 Ch. D. 696. L. J. James, after stating the substance of the decision appealed from, namely, that the notice given by the plaintiff to the solicitors who were acting as attorneys for the trustees and executors, was in itself a sufficient notice to make the trustees liable to the same extent as if it had been given to them personally, proceeds (p. 409): "That appears to me a startling proposition. I can not see any principle leading to such a conclusion. I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of solicitor, that is to say, that a man has got a solicitor not as a person whom he is employing to do some particular business for him, either conveyancing, or conducting an action, but as an official solicitor; and that because the solicitor has been in the habit of acting for him, or been employed to do something for him, such solicitor is his agent to bind him by anything he says, or to bind him by receiving notices or information. There is no such officer known to the law. A man has no more a solicitor in that sense than he has an accountant, or a baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ him or deal with him, *and in the matter in which he is so employed.* Beyond that the solicitorship does not extend. * * * * I am prepared, therefore, to say, that before a notice of this kind can have the slightest validity, it must be given, if given to a solicitor, to a solicitor who is actually, *either expressly or impliedly, authorized as agent to receive such notices.*" L. J. Bramwell added (p. 415): "As Lord Justice James has said, there is no such thing as a standing relation of solicitor to a man. A man is solicitor for another only when that other has occasion to employ him. That employment may be either to conduct a suit or to advise him about some matter in which legal advice is required; but there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes."

[1] See Lord Brougham's remarks in the often quoted case of Kennedy v. Green, 3 My. & K. 699. In the case of Boursot v. Savage, L. R., 2 Eq. 134, 142, Kindersley, V. C., said: "It is a moot question upon what principle this doctrine rests. It has been held by some that it rests on this; that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this; that my solicitor is *alter ego;* he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable." If in this ex-

§ 667. **Scope and Applications.**—This general rule is of wide application. It embraces in its operation, not only ordinary agents and attorneys, but all persons who act for or represent others in business relations and transactions. Thus, it applies to directors, managers, presidents, cashiers, and other officers, while engaged in the business affairs of their corporations;[1] to trustees acting on behalf of their beneficiaries;[2] to an agent acting on behalf of a married woman;[3] to one of two or more joint agents;[4] and to all actual agents, whether the agency be express or implied.[5] The general rule also applies where the same agent or attorney in reality acts on behalf of both parties to the transaction; for both the grantor and the grantee, the vendor and the vendee, the mortgagor and the mortgagee.[6] This special application of the rule is carefully guarded by the courts so that it shall not work injustice, and is not, therefore, enforced unless the same agent is in fact acting for both parties.[7]

tract "agent" and "principal" are substituted for "solicitor" and "client," we shall have a statement of the *rationale* in its most general form.

[1] Ex parte Larking, L. R., 4 Ch. D. 566; Smith v. Water Comm'rs, 38 Conn. 208; Tagg v. Tenn. Nat. Bk., 9 Heisk. 479; Fulton B'k v. Canal Co., 4 Paige, 127; B'k of U. S. v. Davis, 2 Hill, 451; New Hope Bridge Co. v. Phœnix B'k, 3 N. Y. 156; Washington B'k v. Lewis, 22 Pick. 24; Branch B'k v. Steele, 10 Ala. 915; Holden v. N. Y. & Erie B'k, 72 N. Y. 286; North River B'k v. Aymar, 3 Hill, 262; National Security B'k v. Cushman, 121 Mass. 490; First Nat. B'k etc. v. Town of Milford, 36 Conn. 93.

[2] Willes v. Greenhill, 4 De G. F. & J. 147, 150; Myers v. Ross, 3 Head, 59.

[3] As where the agent is her husband: Willes v. Greenhill, 4 De G. F. & J. 147, 150; Clark v. Fuller, 39 Conn. 238; Duke v. Balme, 16 Minn. 306; see Pringle v. Dunn, 37 Wis. 449.

[4] Willes v. Greenhill, 4 De G. F. & J. 147, 150; as where the notice is to one of several directors of a bank: Bank of U. S. v. Davis, 2 Hill, 451, 464.

[5] Watson v. Wells, 5 Conn. 468; Farrington v. Woodward, 82 Pa. St. 259. The mere fact, however, that a purchase is made by two persons jointly, does not constitute them agents for each other, so that notice to one is therefore a notice to the other: Snyder v. Sponable, 1 Hill, 567; 7 Id. 427; Flagg v. Mann, 2 Sumn. 486, 534.

[6] In fact the most striking illustrations of the rule have arisen under these circumstances. Le Neve v. Le Neve, Ambl. 436; 2 Eq. Lead. Cas. 109 (4th Am. ed.); Kennedy v. Green, 3 My. & K. 699; Dryden v. Frost, 3 My. & Cr. 670, 673; Sheldon v. Cox, 2 Eden, 224; Tweedale v. Tweedale, 23 Beav. 341; Fuller v. Bennett, 2 Hare, 394, 402; Holden v. N. Y. & Erie Bk., 72 N. Y. 286; First Nat. Bk. etc. v. Town of Milford, 36 Conn. 93; Losey v. Simpson, 3 Stockt. Ch. 246. Also where the grantor or vendor himself acts on behalf or as attorney for the grantee or vendee. Robinson v. Briggs, 1 Sm. & Giff. 188; Spencer v. Topham, 2 Jur. (N. S.) 865; Majoribanks v. Hovenden, Drury, 11; 6 Ir. Eq. Rep. 238; Atkyns v. Delmege, 12 Id. 1; Twycross v. Moore, 13 Id. 250; Tucker v. Henzill, 4 Ir. Ch. Rep. 513; *In re* Rorke, 13 Id. 273; 14 Id. 442.

[7] Thus, the mere fact that only one attorney is employed or engaged in a transaction, a sale, or purchase, or a mortgaging, does not necessarily make him the attorney for both parties, so that one party shall thereby be charged with constructive notice of facts known by the other: Espin v. Pemberton, 3 De G. & J. 547, 554, 555; Wythes v. Labouchere, 3 De G. & J. 593; Perry v. Holl, 2 De G. F. & J. 38, 53, per Lord Chan. Campbell: "It does not follow, that if there is

§ 668. **Limitations: Within the Scope of the Agent's Authority.**—There are, on the other hand, certain important limitations upon the operation of the general rule. The employment of an agent or attorney to do a merely ministerial act for his principal, does not constitute him such an agent that the rule as to constructive notice will apply.[1] Also, in pursuance of the fundamental doctrine of agency concerning the powers of agents, the notice given to or information acquired by the agent, in order to be operative upon the principal, must be within the scope of the agent's authority to bind the principal. If an agent can not bind his principal by acts beyond the limits of his authority, a notice beyond those limits is equally nugatory.[2] Finally, in order that the rule may apply, the agent must be an attorney in fact, rather than a mere attorney at law. Wherever a solicitor or attorney at law is brought within the operation of the rule, he must be employed in some other capacity than as a *mere* professional and legal adviser; he must be employed to represent his client in a transaction whereby the principal is to acquire some rights or is to be subjected to some liabilities.[3]

§ 669. **Notice to Agent, Actual or Constructive.**—If the agency exists and the foregoing requisites are complied with so as admit the application of the general rule, then it will operate with equal force and effect, whether the notice to the agent be actual or constructive. Actual knowledge may be brought home to the agent by the most direct evidence, or he may be chargeable with constructive notice by a *lis pendens*, by a registration, by recitals in title-deeds, by possession of a stranger, or by circumstances sufficient to put a prudent man

not an attorney on each side, the attorney who does act is the attorney of both." Also the mere fact that two corporations have the same attorney, or the same directors, does not render each chargeable with notice of whatever is known or done by the other. Banco de Lima v. Anglo-Peruvian B'k, L. R., 8 Ch. D. 160, 175; *In re* Marseilles etc. Co., L. R., 7 Ch. 161; *In re* European B'k, L. R., 5 Ch. 358; Fulton B'k v. N. Y. etc. Canal Co., 4 Paige, 127.

[1] As where he is employed simply to procure the execution of a deed. Wyllie v. Pollen, 3 De G. J. & S. 596, 601. Or to record a mortgage: Anketel v. Converse, 17 Ohio St. 11; Hoppock v. Johnson, 14 Wisc. 303. But notice to an officer employed to execute an attachment is notice to the plaintiff in the suit. Tucker v. Tilton, 55 N. H. 223.

[2] Spadone v. Manvel, 2 Daly, 263; Weisser v. Denison, 10 N. Y. 68; Brown v. Bankers etc. Tel. Co., 30 Md. 39; Roach v. Karr, 18 Kans. 529; Wilson v. Conway Fire Ins. Co., 4 R. I. 141, 152; Grant v. Cole, 8 Ala. 519.

[3] All the decisions implicitly, at least, sustain this conclusion. Wherever the agent has been a solicitor or attorney at law, it will be seen that he has been employed in some such transaction, the negotiation of a lease and giving a mortgage, the transfer of property, and the like. See Saffron etc. Soc. v. Rayner, L. R., 14 Ch. D. 406, 409, 415, and the quotation therefrom *ante*, under § 666.

upon an inquiry; in all such cases the effect upon the principal is the same.[1] The notice with which the principal is charged is, however, constructive; since it is a presumption, and generally a conclusive presumption of the law, and takes effect even when the principal, in fact, received no communication of information from his agent.[2]

§ 670. **Essential Requisites—(1) When the Notice must be Received by the Agent: During his Actual Employment.**—Having thus stated the general rule, I shall now proceed to describe with more fullness its essential elements, the requisites which must exist in order that it may operate. In the first place, as to the time when the information constituting notice must be acquired by or given to the agent. In order that the principal may be affected with a constructive notice, under this rule, the information constituting the notice must be obtained by or imparted to the agent, while he is in fact acting *as agent*,—while he is actually engaged in doing his principal's business, in pursuance of his authority, and in his character as agent.[3] This special requisite finds a frequent application in the relations subsisting between directors and officers and the corporations to which they belong.[4]

[1] See Kennedy v. Green, 3 My. & K. 699, 719, *per* Lord Brougham; Bank of U. S. v. Davis, 2 Hill, 451, 461.

[2] There can be no greater misconception of its legal meaning, and no more complete confusion of the distinctions between the two kinds of notice, than to call the notice imputed to a principal through his agent, an "actual" notice. See Espin v. Pemberton, 3 De G. & J. 547, 554.

[3] Saffron etc. Soc. v. Rayner, L. R., 14 Ch. D. 406; *In re* Peruvian Ry. Co., L. R., 2 Ch. 617, 626; Dryden v. Frost, 3 My. & Cr. 670; Wilde v. Gibson, 1 H. L. Cas. 605, 624; Pepper v. George, 51 Ala. 190; Roach v. Karr, 18 Kans. 529; Houseman v. Girard etc. Ass'n, 81 Pa. St. 256; G. W. Ry. Co. v. Wheeler, 20 Mich. 419; Pringle v. Dunne, 37 Wisc. 449; Distilled Spirits, 11 Wall. 356; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; May v. Borel, 12 Id. 91; Russell v. Sweezey, 22 Mich. 235; Hodgkins v. Montgomery Co. Ins. Co., 34 Barb. 213; Weisser v. Denison, 10 N. Y. 68; Howard Ins. Co. v. Halsey, 8 Id. 271; Smith v. Denton, 42 Iowa, 48; Jones v. Bamford, 21 Id. 217; Clark v. Fuller, 39 Conn. 238; Spadone v. Manvel, 2 Daly, 263; N. Y. Cent. Ins. Co. v. Nat. Protec. Ins. Co., 20 Barb. 468; 14 N. Y. 85; Fry v. Shehee, 55 Ga. 208.

If, then, an agent has obtained information while acting for himself, or for a third person, or, in general, previously to the commencement of his agency, the principal is not charged with constructive notice thereof. McCormick v. Wheeler, 36 Ill. 114.

[4] It has been held in numerous American decisions that notice given to, or information acquired by, a corporation director, manager, or officer will not affect the corporation itself with a constructive notice, unless he was at the time of the giving or acquiring acting on behalf of his corporation. It is not enough that he was, at that time, clothed with the official character; he must also, in pursuance of his official functions, have been actually engaged in transacting the business of his corporation. There are two exceptions or limitations. If the information received by him is of such a nature, or is acquired under such circumstances, that it is a part of his express official duty to communicate what he knows or has learned to the managing body or board, then the

§ 671. (2) **In the Same Transaction.**—In the second place, in order that a principal may thus be charged with constructive notice, not only must the person first receiving it be, in fact, an agent, and be actually engaged in the business of his representative employment, but the notice must be given to, or the information acquired by, the agent or attorney in the course of the *same transaction* which is sought to be affected by the constructive notice; that is, in the same transaction from which the principal's rights and liabilities arise, which, it is claimed, depend upon or are modified by the constructive notice imputed to him. This is, in general, a well-settled requisite; and the grounds for it, depending upon motives of expediency, were thus stated by Lord Hardwicke in an early case. A different rule, he said, "would make purchasers' and mortgagees' titles depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions."[1]

§ 672. **Limitation: Prior Transaction.**—The foregoing requisite, general as it is in its application, is subject to an important and well-settled limitation, equally depending upon

corporation will be affected with a constructive notice. Also, if the transaction in which the information was obtained was so recent, or the information itself was so positive, direct, and strong, that it must be regarded as certainly remaining present in the mind or memory of the official, then the case may fall under the operation of a rule stated in a subsequent paragraph (*post*, § 672), and a constructive notice to the corporation may follow. Fulton B'k v. N. Y. & Sharon C. Co., 4 Paige, 127; Seneca Co. B'k v. Neass, 5 Denio, 329, 337; Miller v. Ill. Cent. R. R., 24 Barb. 312; North River B'k v. Aymar, 3 Hill, 262; Farmers' B'k v. Payne, 25 Conn. 444; U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Gen. Ins. Co. v. U. S. Ins. Co., 10 Md. 517; Winchester v. B. & S. R. R., 4 Id. 231; Brown v. Bankers' etc. Tel. Co., 30 Id. 39; G. W. Ry. Co. v. Wheeler, 20 Mich. 419; President etc. v. Cornen, 37 N. Y. 320; B'k of U. S. v. Davis, 2 Hill, 451; National B'k v. Norton, 1 Id. 572; Atlantic etc. B'k v. Savery, 82 N. Y. 291, 307; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54, 61.

[1] Banco de Lima v. Anglo-Peruvian B'k, L. R., 8 Ch. D. 160, 175; Wyllie v. Pollen, 3 De G. J. & S. 596, 601; Lloyd v. Attwood, 3 De G. & J. 614, 657; Finch v. Shaw, 19 Beav. 500; 5 H. L. Cas. 905; Tylee v. Webb, 6 Beav. 552; 14 Beav. 14; Fuller v. Bennett, 2 Hare, 394; Warrick v. Warrick, 3 Atk. 294; Worsley v. Earl of Scarborough, 3 Id. 392; Hine v. Dodd, 2 Id. 275; Lowther v. Carlton, 2 Id. 242; Ashley v. Baillie, 2 Ves. sen. 368; Wilde v. Gibson, 1 H. L. Cas. 605, 624; Houseman v. Girard etc. Ass'n, 81 Pa. St. 256, 261; Holden v. N. Y. & Erie B'k, 72 N. Y. 286; Howard Ins. Co. v. Halsey, 8 Id. 271; Weiser v. Denison, 10 Id. 68; Bierce v. Red Bluff Hotel Co., 31 Cal. 160; North River B'k v. Aymar, 3 Hill, 262; Russell v. Sweezey, 22 Mich. 235; Smith v. Denton, 42 Iowa, 48; Blumenthal v. Brainerd, 38 Vt. 402, 410; Roach v. Karr, 18 Kans. 529; Allen v. Poole, 54 Miss. 323; Pringle v. Dunn, 37 Wisc. 449; McCormick v. Wheeler, 36 Ill. 114; Bracken v. Miller, 4 Watts & S. 102; Hood v. Fahnestock, 8 Watts, 489; Lawrence v. Tucker, 7 Greenl. 195; but see *per contra*, Hart v. Farm. & Mech. B'k, 33 Vt. 252; Abell v. Howe, 43 Id. 403. The same requisite applies, as has been shown in a previous paragraph, when the notice is sought to be charged upon a party personally, and not through an agent. See Hamilton v. Royse, 2 Sch. & Lef. 315, 327, *per* Lord Redesdale.

motives of expediency. Where the transaction in question closely follows and is intimately connected with a prior transaction in which the agent was also engaged, and in which he acquired material information, or where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, then the foregoing requisite becomes inapplicable; the notice given to or information acquired by the agent in the former transaction, operates as constructive notice to the principal in the second transaction, although that principal was a complete stranger to, and wholly unconnected with, the prior proceeding or business.[1] The explanation of this special rule is

[1] Several of the ablest English judges have, in recent cases, expressed a decided opinion against the rule itself, and while considering themselves bound by it, so far as it is settled, have wished that it should be abrogated by the legislature. Fuller v. Bennett, 2 Hare, 394; Atterbury v. Wallis, 8 De G. M. & G. 454; Hargreaves v. Rothwell, 1 Keen, 154, 159; Mountford v. Scott, T. & R. 274; Nixon v. Hamilton, 2 Dr. & Wal. 364; Winter v. Lord Anson, 3 Russ. 488, 493; Perkins v. Bradley, 1 Hare, 219; Lenehan v. McCabe, 2 I. Eq. Rep. 342; Majoribanks v. Hovenden, 6 Id. 238; The Distilled Spirits, 11 Wall. 356; Patten v. Ins. Co., 40 N. H. 375; Hovey v. Blanchard, 13 Id. 145; Dunlap v. Wilson, 32 Ill. 517; Williams v. Tatnall, 29 Id. 553; Pritchett v. Sessions, 10 Rich. (Law), 293; Wiley v. Knight, 27 Ala. 336; Abell v. Howe, 43 Vt. 403; Hart v. Farm. & M. B'k, 33 Id. 252; Murray v. Ballou, 1 Johns. Ch. 566, 574; Ames v. N. Y. Union Ins. Co., 14 N. Y. 253; Holden v. N. Y. & Erie B'k, 72 N. Y. 286, 292; Tagg v. Tenn. Nat. B'k, 9 Heisk. 479. In Fuller v. Bennett, 2 Hare, 394, Wigram, V. C., gives a very full and instructive discussion of this special rule, explaining its grounds, and exhibiting its necessary limitations. In the case of Distilled Spirits, *supra*, the rule is approved and adopted by the supreme court of the United States, and it is stated by Bradley, J., in the following summary: "In England, the doctrine seems now to be established, that if the agent at the time of effecting a purchase, has *knowledge* of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at the time; if he acquired previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time, and other circumstances. Knowledge communicated to the principal himself, he is bound to recollect; but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present, seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that the principal is bound by the agent's knowledge, is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it it not the agent's duty to communicate such knowledge, but it would be unlawful for him to do so—as for example, when it has been acquired confidentially as attorney for a former client, in a prior transaction—the reason of the rule ceases; and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by the agent's secret and con-

plainly to be found in the notion that the information obtained by the agent in his former employment was of such a nature, so definite and certain, that it amounted to actual *knowledge;* and as knowledge it is retained by him and carried with him into the subsequent business which he transacts on behalf of his new principal. While this particular rule is settled by a strong array of authorities, the courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits. The two essential requisites of the general rule, together with the foregoing limitation, are the results or phases of one legal conception. In order that the information obtained by an agent may be a constructive notice to his principal in any given transaction, it must be present to the agent's mind and memory while he is engaged in the transaction which

fidential information." A very important modification or addition to the rule, which has a special application to agents of corporations, was laid down by Folger, J., in Holden v. N. Y. & Erie Bank, 72 N. Y. 286, 292. The view which he takes can not be better explained than by quoting his own language: "Notice must have come to the agent, it is said, in the course of the very transaction, or so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is short-lived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated. But where the agency is continuous, and concerned with a business made up of a long series of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material. If the principal in this case, the New York and Erie Bank, had been insolvent, say on the first day of January, in a given year, and that fact had then been known to its president, Ganson, and the fact and knowledge of it were material in a transaction of the bank, taking place through him on the first day of the succeeding April, the knowledge acquired by him on the first-named day was knowledge with which the bank was chargeable on the last-named day; and so it would have been with knowledge of any fact not so intimately connected with the condition of the bank—the principal—but relating to the character and position of dealers with it. Porter v. B'k of Rutland, 19 Vt. 410. We doubt not that the knowledge of its president, Ganson, was chargeable to the bank, so far as that knowledge was material in the transaction now under consideration. It mattered not, when, during the course of his prior official management of the affairs of the bank, he acquired the knowledge; it was knowledge acquired in its business, and applicable to any subsequent transaction in which it was material. * * * In the Bank of U. S. v. Davis, 2 Hill, 451, the director of the plaintiff carried into the meeting of the board of directors, knowledge which he had before acquired as an individual, yet the bank was charged with that knowledge. So, in Fulton B'k v. N. Y. & Sharon C. Co., 4 Paige, 127, though it was held that the plaintiff was not chargeable with notice of facts which came to the knowledge of its president while not acting as its agent, yet it was also said, that if afterwards it became his duty to act upon that knowledge in the business of the bank, his principal would be chargeable with notice of the facts of which he had acquired the knowledge while acting in another capacity than as agent of the bank." The decision in Tagg v. Tenn. Nat. B'k, *supra*, is to the same effect.

is sought to be affected. This is universally true. If the agent acquired the information while acting for his principal, and *while engaged in that very same transaction*, then it is conclusively presumed that he retains the information present to his mind and in his memory; a failure of memory on his part can not be shown, and the principal is charged with the constructive notice. If the agent acquired the information in a former and independent transaction, then it is *prima facie* presumed that he does not retain it present to his mind and memory while engaged in the subsequent transaction in behalf of a principal whom it is sought to charge with notice; but this presumption may be overcome by evidence. If, therefore, it be clearly shown by the evidence that the agent did in fact retain the previously acquired information present to his mind and memory while engaged in the subsequent transaction on behalf of his principal, then all the essential elements of the general rule are existing, and the principal is thereby charged with constructive notice. This is, as it seems to me, the true *rationale* of the doctrine in all its phases and applications; and is fairly deducible from the decided cases.

§ 673. (3) **The Information Material; and Such as the Agent is Bound to Communicate.**—A third requisite is, that the information acquired by the agent must be material to the transaction in which the principal's rights are to be affected by a notice, and it must be something which it is the duty of the agent, by virtue of his fiduciary and representative relation, to communicate to his principal.[1] It is not essential, however,

[1] Wyllie v. Pollen, 3 De G. J. & S. 596, 601; Rolland v. Hart, L. R., 6 Ch. 678, 681, 682; The Distilled Spirits, 11 Wall. 356, *per* Bradley J.; Roach v. Karr, 18 Kans. 529; Pringle v. Dunn, 37 Wisc. 449; Jones v. Bamford, 21 Iowa, 217; May v. Borel, 12 Cal. 91; Fry v. Shehee, 55 Ga. 208. In Wyllie v. Pollen, *supra*, Lord Westbury said: "The agent's knowledge must have been of something material to the particular transaction, and something which it was the agent's duty to communicate to his principal; the whole doctrine of constructive notice resting on the ground of the existence of such a duty on the part of the agent." In Rolland v. Hart, *supra*, Lord Hatherley tersely sums up both branches of the doctrine stated in the text: "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is notice to his client. * * * It can not be left to the possibility or impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain." The duty of the agent to communicate the information to his principal is a most essential element of the doctrine. If the information of the agent was acquired in a previous employment as attorney for another person, and was private and confidential in its nature, a moral and legal obligation would rest upon him not to disclose it; he would be under no duty to communicate the knowledge to a subsequent client, and consequently such

that the agent should, in fact, have communicated the information to his principal. On the contrary, the general rule of constructive notice between agent and principal depends upon a legal presumption—absolutely conclusive except in two special instances—that the information received by the agent was communicated to his principal. The powerful motives of policy inhere in this very presumption.[1] Even when an agent's failure to communicate is fraudulent, provided the fraud consists merely in such concealment and failure, the conclusive presumption still arises, as will be more fully shown in the following paragraphs.

§ 674. **Exceptions; Presumption when not Conclusive.** There are, however, two special exceptions to the foregoing doctrine, two special conditions in which the presumption may be rebutted, in which it may be shown that the information was not communicated by the agent to his principal, and in which, as a consequence, the principal is not charged with a constructive notice. Both of these exceptions rest upon a foundation of fraud. In the first place, when an attorney or agent acting for both the parties to a transaction, A. and B.—for both the vendor and vendee, mortgagor and mortgagee—has or receives information of any material fact, such as the existence of a document, and *with the consent of one party A.*, conceals his knowledge from the other party B., then B. will not be charged with constructive notice of such fact. The conduct of A. in consenting to the agent's concealment is clearly a fraud upon B.; he is estopped from afterwards insisting that B. received notice, and thereby taking advantage of his own wrong.[2]

§ 675. **Agent's Fraud.**—The second exception is much more important and of far wider application. It is now settled

client could not be charged with constructive notice. See the remarks of Bradley, J., in the Distilled Spirits, quoted in the note under the last preceding paragraph.

[1] Bradley v. Riches, L. R., 9 Ch. D. 189, 196; Rolland v. Hart, L. R., 6 Ch. 678, 681, 682 (*supra*); Boursot v. Savage, L. R., 2 Eq. 134, 142; Hewitt v. Loosemore, 9 Hare, 449, 455; Williamson v. Brown, 15 N. Y. 354; Suit v. Woodhall, 113 Mass. 391; Owens v. Roberts, 36 Wisc. 258. In the recent case of Bradley v. Riches, *supra*, the rule is stated in the following clear and decided language: "The solicitor must be assumed to have communicated the facts [*i. e.*, facts of which he had received information] to his client, and the knowledge of the agent is, to use the language of Lord Chelmsford in Espin v. Pemberton, 3 De G. & J. 547, the imputed knowledge of the client. It appears to me to be clear that that presumption or imputation is a thing which the client can not be allowed to rebut. If it could be rebutted, it was amply rebutted in Le Neve v. Le Neve. If it could be rebutted, the language of Lord Hatherley in Rolland v. Hart could not be upheld." (See this language quoted in last preceding note.)

[2] Sharpe v. Foy, L. R., 4 Ch. 35, 40, 41; Hewitt v. Loosemore, 9 Hare, 449, 455, per Turner, V. C.

by a series of decisions possessing the highest authority, that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed. In other words, if in the course of the same transaction in which he is employed, the agent commits an independent fraud for his own benefit, and designedly against his principal, and it is essential to the very existence or possibility of such fraud that he should conceal the real facts from his principal, then the ordinary presumption of a communication from the agent to his principal fails; on the contrary, a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice.[1] The courts have carefully confined the operation of

[1] Cave v. Cave, L. R., 15 Ch. D. 639, 643; *In re* European B'k, L. R., 5 Ch. 358, 361, 362; Rolland v. Hart, L. R., 6 Ch. 678, 682; Waldy v. Gray, L. R., 20 Eq. 238, 251; Thompson v. Cartwright, 2 De G. J. & S. 10; 33 Beav. 178; Frail v. Ellis, 16 Beav. 350; Hiorns v. Holtom, 16 Id. 259; Greenslade v. Dare, 20 Id. 284, 291; Neesom v. Clarkson, 2 Hare, 163; Hewitt v. Loosemore, 9 Hare, 449, 455; Ogilvie v. Jeaffreson, 2 Giff. 353; Robinson v. Briggs, 1 Sm. & Giff. 188; Spencer v. Topham, 2 Jur. (N. S.) 865; Jones v. Smith, 1 Phil. 244, 256; Kennedy v. Green, 3 My. & K. 699; Fulton B'k v. N. Y. & Sharon C. Co., 4 Paige, 127; Barnes v. Trenton Gas Co., 27 N. J. Eq. (12 C. E. Green) 33; McCormick v. Wheeler, 36 Ill. 114; Winchester v. Susquehanna R. R., 4 Md. 231; Hope Fire Ins. Co. v. Cambreling, 1 Hun, 493. In several of these cases the attorney was employed for both parties to the transaction, but this fact does not seem to be essential. Kennedy v. Green, *supra*, is the leading case in which this doctrine was first regularly formulated by Lord Brougham. In Rolland v. Hart, *supra*, Lord Hatherley said: "It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him." In the very recent case of Cave v. Cave, *supra*, the court, having all the decisions before it, thus sums up the doctrine: "There is undoubtedly an exception to the construction or imputation of notice from the agent to the principal, that exception arising in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy. This exception has been put in two ways. In the very well known case of Rolland v. Hart, Lord Hatherley put it substantially this way, that you must look at the circumstances of the case, and inquire whether the court can see that the solicitor intended a fraud, which would require the suppression of the knowledge of the incumbrance from the person upon whom he was committing the fraud. In Thompson v. Cartwright, 33 Beav. 178, the late Master of Rolls put it rather differently, and it would appear that in his view you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated. In the one view notice is not imputed, because the circumstances are such as not to raise the conclusion of law, which does ordinarily arise from the

this exception to the condition described where a presumption necessarily arises that the agent did not disclose the real facts to his principal, because he was committing such an independent fraud that concealment was essential to its perpetration; it has never been extended beyond these circumstances. It follows, therefore, that every fraud of an agent in the course of his employment and in the very same transaction, does not fall within this exception; and most emphatically, it does not apply when the agent's fraud consists merely in his concealment of material facts within his own knowledge from his principal.[1]

mere existence of notice to the agent; in the other view—that of Lord Hatherley—the act done by the agent is such as can not be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent."

Whether this exception can apply to directors, presidents, and other such managing officers of a corporation, through whom alone the corporation *can* act, may, I think, be doubted. See Holden v. N. Y. & Erie B'k, 72 N. Y. 286, and First Nat. B'k etc. v. Town of New Milford, 36 Conn. 93; but see Barnes v. Trenton Gas Co., 27 N. J. Eq. (12 C. E. Green), 33.

[1] It is sometimes very difficult to determine whether a case does or does not fall under this exception. Many of the decisions confessedly rest upon very narrow distinctions. Rolland v. Hart, L. R., 6 Ch. 678, 682; Boursot v. Savage, L. R., 2 Eq. 134, 142; Atterbury v. Wallis, 8 De G. M. & G. 454, 466; Davis v. B'k of U. S., 2 Hill, 451; Holden v. N. Y. & Erie B'k, 72 N. Y. 286; B'k of New Milford v. Town of New Milford, 36 Conn. 93; Tagg v. Tenn. Nat. B'k, 9 Heisk. 479. In Boursot v. Savage, *supra*, the attorney committed a fraudulent breach of a trust existing in reference to the property which was the subject of negotiation. Kindersley, V. C., said (p. 142): "It is insisted that the doctrine of constructive notice can not apply, because the agent Holmes was committing a fraud, and the client is not to be affected with constructive notice of a fraud committed by his solicitor. But if the client would be affected with constructive notice of a trust, the existence of which is known to his solicitor, in the case where there is fraud, the fact that the solicitor is committing a fraud in relation to that trust, can not afford any reason why the client should not be affected with constructive notice of the existence of the trust. It is the existence of the trust, and not the fraud, of which he is held to have constructive notice; and the constructive notice of the existence of the trust must be imputed to him, whether there is a fraud relating to it or not." In Rolland v. Hart, *supra*, Lord Hatherley, in meeting the defense based upon the case of Kennedy v. Green, said (p. 682): "I think with L. J. Turner, that the question how far you are justified in assuming that the agent does not communicate to his client information which he has received, and ought to have communicated, may be affected by very delicate shades of difference. It might be said that the very fact of the solicitor not having communicated an important circumstance, is of itself evidence of the fraud. But L. J. Turner, in the case of Atterbury v. Wallis, exactly meets that difficulty, and says that such a rule can not prevail. * * * Robinson [the attorney] was not raising money for himself but for Hall; and though he grievously neglected his duty, he does not appear to have been concerned in any fraud *which would render concealment necessary*, so as to bring the case within Kennedy v. Green." In the well-considered case of Atterbury v. Wallis, *supra*, L. J. Turner said (p. 466): "The case of Kennedy v. Green was much relied upon by the defendant; but I thought in Hewitt v. Loosemore, 9 Hare, 449, and I continue to think, that that case does not govern cases like the present. In that case there was fraud,

§ 676. **True Rationale of the Rule: Based wholly upon Policy and Expediency.**—The rule of constructive notice through agent to principal, like the doctrine of constructive notice in general, must find its ultimate foundation and only support in motives of policy and expediency. It will not aid us in the least to inquire whether it should be derived from the notion that the agent is identical with his principal—is the principal's *alter ego*, or from the notion that the principal can not be allowed to acquire and retain a benefit through means of an act or proceeding which his agent knew to be wrong. The true *rationale* is, as I have already shown, that the agent's knowledge of material facts—not necessarily of the ultimate facts—or what the law assumes to be his knowledge, must always, from considerations of expediency, be regarded and treated as the principal's knowledge; otherwise the business affairs of society could not be safely transacted. Whenever the knowledge of the agent is actual, that is, whenever he has obtained actual information of certain facts, and has therefore received actual notice, this imputation of his knowledge to the principal is evident and reasonable. Whenever the agent's knowledge of certain facts exists only in contemplation of law—that is, when he has received a constructive notice—the imputation thereof to the principal is no less reasonable and clear. If, under any circumstances, a party, while dealing for himself, must be treated

independently of the question whether the act which had been done was made known or not. In such cases as the present the question of fraud wholly depends upon whether the act which has been done has been made known or not." The decision in Holden v. N. Y. & Erie B'k, 72 N. Y. 286, was the same, in principle, as Boursot v. Savage. The same person was trustee under a will for certain minors, and president and chief managing officer of the bank. He had seventeen thousand dollars of trust money in his hands which were deposited in the bank to his credit as such trustee. He was at the same time personally indebted to the bank to a very large amount, and his private account was heavily overdrawn. The bank was utterly insolvent, and this fact was known to him although not yet published to the world. In this condition he committed a fraudulent breach of his trust, by transferring the said trust moneys to the bank in part payment of his private indebtedness. This was done in reality for the benefit of the bank, and the fraud was against the beneficiaries entitled under the trust. The court of appeals held that the bank had constructive notice of all these facts which were known to its president, viz., that the money transferred was subject to the trust, and that the transfer was a fraud upon the *cestuis que trustent*, and a violation of the trustees' fiduciary duties. The case, therefore, came under the general rule, and not under the exception. First Nat. B'k of Milford v. Town of Milford is similar in its essential features. It has also been said that information given to or known by an attorney is not notice to his client, when the attorney himself is the borrower. This would seem to fall under the same reason, viz., that it is presumed the information would not be communicated. See Hope Fire Ins. Co. v. Cambreling, 1 Hun, 493; Winchester v. Susquehanna R. R., 4 Md. 231; McCormick v. Wheeler, 36 Ill. 114.

in contemplation of law as one who has acquired certain information, and must be charged with constructive notice thereby, the same result must follow, when, under like circumstances, the party is dealing by means of an agent. If that assumed information called constructive notice should affect a party acting for himself, it should equally affect him acting through an attorney. As the doctrine is thus based entirely on motives of policy, it should never in its application transcend the scope and limits of those motives. Whenever its operation in a given state of facts would produce manifest injustice, the courts should, if not absolutely compelled by express authority, withhold such operation. A tendency to restrict the doctrine, to confine it within the limits already established, is clearly exhibited by many of the recent decisions. Some of the ablest judges now on the English bench have even expressed a strong dissent from the doctrine itself in some of its phases and applications, especially where a principal is charged with notice of information acquired by his agent in a former transaction, and which such agent is assumed to have remembered. The English cases in which this branch of the rule commonly arises, are more frequent, involve a different condition of circumstances, and are consequently much more harsh in their effects than the analogous class of cases which come before the American courts.

SECTION VI.

CONCERNING PRIORITIES.

ANALYSIS.

§ 677. Questions stated.
§§ 678–692. *First.* The fundamental principles.
§§ 679–681. I. Estates and interests to which the doctrine applies.
§ 682. II. Equitable doctrine of priority, in general.
§§ 683–692. III. Superior and equal equities.
§ 683. When equities are equal.
§§ 684–692. Superior equities defined and described.
§ 685. 1. From their intrinsic nature.
§§ 686, 687. 2. From the effects of fraud and negligence.
§§ 688–692. 3. From the effects of notice.
§ 688. General rules and illustrations.
§ 689. Notice of a prior covenant.
§§ 690–692. Time of giving notice, and of what it consists.
§§ 693–734. *Second.* Applications of these principles.
§§ 693–715. Assignments of things in action.
§ 693. Dearle v. Hall.
§§ 694–696. I. Notice by the assignee.

§ 694. Notice to debtor not necessary as between assignor and assignee.
§§ 695–697. English rule, notice to debtor necessary to determine the priority among successive assignees.
§§ 698–702. II. Diligence of the assignee.
§ 698. General rules: Judson v. Corcoran.
§§ 699–701. Assignment of stock as between assignee and assignor, and the company, judgment creditors of assignor, and subsequent purchasers.
§ 702. Notice to the debtor necessary to prevent his subsequent acts.
§§ 703–715. III. Assignments of things in action subject to equities
§§ 704–706. 1. Equities in favor of the debtor.
§ 704. General rule: assignments of mortgages; kinds of defenses.
§§ 705, 706. Provisions in codes of procedure.
§§ 707–713. 2. Equities between successive assignors and assignees.
§ 707. Conflicting decisions; mode of reconciling.
§§ 708, 709. General rule: assignment subject to latent equities; illustrations.
§§ 710, 711. When the rule does not apply; effect of estoppel; true limits of the estoppel as applied to such assignments.
§ 712. Subsequent assignee obtaining the legal title protected as a *bona fide* purchaser.
§ 713. Successive assignments by same assignor to different assignees.
§§ 714, 715. 3. Equities in favor of third persons.
§ 714. General rule: assignments subject to such equities.
§ 715. Contrary rule: assignments free from all latent equities.
§§ 716–732. Equitable estates, mortgages, liens, and other interests.
§ 717. Doctrine of priorities modified by recording acts.
§§ 718, 719. I. Priority of time among equal equities.
§ 719. Illustrations: simultaneous mortgages, substituted liens, etc.
§§ 720–726. II. One equity intrinsically the superior.
§ 720. Prior general and subsequent specific lien.
§§ 721, 722. Prior unrecorded mortgage and subsequent docketed judgment.
§ 723. Same, where judgment creditor had notice.
§ 724. Prior unrecorded mortgage and purchase at execution sale under a subsequent judgment.
§ 725. Purchase money mortgages.
§ 726. Other illustrations.
§§ 727–729. III. A subsequent equity protected by obtaining the legal title.
§ 728. Legal estate obtained from a trustee.
§ 729. Legal estate obtained after notice of prior equity.
§ 730. IV. Notice of existing equities.
§§ 731, 732. V. Effect of fraud or negligence upon priorities.
§§ 733, 734. Assignments of mortgages, rights of priority depending upon them.

§ 677. **Questions Stated: Divisions.**—Having thus ascertained, in the preceding section, what notice is, we are naturally led to inquire, in the next place, what are its effects? In discussing the affirmative aspect of this question, what effects are produced by the presence of notice, it is almost impossible to avoid considering also the negative aspect, what effects are

produced by the absence of notice. In other words, a full treatment of the question, what are the effects of notice, involves the entire subject of priorities, including the particular doctrine of purchase in good faith for a valuable consideration and without notice. The present section will, therefore, be devoted to a discussion of the rules concerning *priorities*, both as they are the immediate effects of notice, and as they exist in the absence of notice. Since the doctrine of *bona fide* purchase for a valuable consideration and without notice is so important, and gives rise to so many particular rules, its full treatment is reserved for the next succeeding section. The whole subject of priorities in all its phases is the development of two simple and fundamental equitable principles. I have thought it expedient, therefore, to present the doctrine, in the present section, in its entirety, in all its applications to various departments of the equity jurisprudence, and not to treat it in a partial and broken manner, under the separate heads of assignments, estates, mortgages, liens, and the like. The doctrine itself is one of great practical importance, and is distinctively equitable; it has no connection with or existence in the common law, except as certain classes of statutes have partially introduced it into that legal system. The subject will be considered in the following order: *First.* A statement and exposition of the general principles upon which the doctrine of priorities rests, and from which it has been developed; *Second.* The application of these principles to the important classes of cases which are governed by the doctrine, namely, assignments of things in action, equitable estates, mortgages, equitable liens, charges and incumbrances, and "equities;" and *Third.* Purchase in good faith for a valuable consideration and without notice.

§ 678. **First. The Fundamental Principles: Equitable Maxims.**—As was stated in a former chapter, the doctrine of priorities in equity is entirely a development of two maxims: "Where there are equal equities, the first in order of time shall prevail," and "Where there is equal equity, the law must prevail."[1] It was there shown, in the language of an eminent judge, that the first of these maxims means: "As between persons having only equitable interests, if their interests are *in all other respects equal*, priority in time gives the better equity, or *qui prior est tempore potior est jure*."[2] The meaning of the second maxim is: "If two persons have equal equitable claims

[1] *Ante*, vol. 1, §§ 413–417.

[2] Ibid, § 414; Rice v. Rice, 2 Drew. 73; see the paragraph referred to for the entire quotation.

upon, or interests in, the same subject-matter; or, in other words, if each is equally entitled to the protection and aid of a court of equity, *with respect of his equitable interest*, and one of them, in addition to his equity, also obtains the legal estate in the subject-matter, then he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by the court of equity simply refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, or in a purely legal action, where, of course, the legal estate alone would be recognized."[1] It follows from these definitions, that the entire discussion upon which we are entering involves the three following inquiries: (1) To what estates and interests does the equitable doctrine of priorities not apply, so that they are left completely controlled by the order of time? (2) Under what circumstances are equities "equal," so that they are left controlled by the order of time, and under what circumstances is one of two or more equities *superior* to the others, so that the order of time may be broken in upon, and the equitable doctrine of priorities may control? (3) Under what circumstances, two or more equities being otherwise "equal," *can* the holder of one of them obtain, and *does* he obtain, the legal title, so that the order of time may be disregarded, and the equitable doctrine of priorities may prevail? The full answers to these three questions, in their combination and mutual effects, plainly constitute the entire discussion of the subject.

§ 679. **I. Estates and Interests to which the Equitable Doctrine Applies. (1) Not to Legal Estates.**—Among purely legal titles to the same subject-matter, successive legal conveyances of and legal estates in the same tract of land, the equitable doctrine of priorities growing out of the presence or absence of notice, or of a valuable consideration, or of any other incident, has absolutely no application nor effect; such legal titles, estates, and interests are, in the absence of any statutory modification, completely controlled, with respect to their priority, by the order of time.[2] Even the mere want of a

[1] *Ante*, vol. 1, § 417; Thorndike v. Hunt, 3 De G. & J. 563, 570, 571; Caldwell v. Ball, 1 T. R. 205, 214; Fitzsimmons v. Ogden, 7 Cranch, 2, 18; Newton v. McLean, 41 Barb. 285.

[2] Gaines v. New Orleans, 6 Wall. (U. S.) 642, 716, *per* Davis, J.; Ruckman v. Decker, 23 N. J. Eq. (8 C. E. Green), 283; Van Amringe v. Morton, 4 Whart. 382; Wade v. Withington, 1 Allen, 561; Waring v. Smyth, 2 Barb. Ch. 119, 133; Arrison v. Harmstead, 2 Barr. 191, 197; Jones v. Jones, 8 Sim. 633. The truth of this proposition is clearly seen from a consideration of the legal conception of estates at law and of conveyances and charges operating at law; and it will plainly appear that between two claimants of legal estates in the same land, the second one in order of time can not, in the absence of the statutes con-

valuable consideration in the earlier conveyance would not, at the common law, affect the priority of legal right given by the priority of time.[1]

§ 680. **Modifications by Statutes concerning Fraudulent Conveyances and Recording.**—This rule, otherwise universal, that among successive legal estates or interests in the same subject-matter, the order of time controls, has been broken in upon by two classes of statutes, which are within the scope of their operation very important. The first of these classes includes that of 27 Eliz., c. 4, by which grants of lands made for the purpose of defrauding subsequent purchasers are declared to be void as against such subsequent purchasers for a valuable consideration, and their representatives; and the statute of 13 Eliz., c. 5, by which conveyances of lands or chattels, made for the purpose of delaying or defrauding creditors, are declared to be void as against such creditors and their repre-

cerning registration, avail himself even of the position of *bona fide* purchaser for a valuable consideration and without notice. If A. being owner of a piece of land in fee, conveys it in fee to B., and afterwards executes a deed in fee of the same land to C., at law, C. can acquire nothing. In contemplation of law the entire estate passed by the deed to B., and there was no interest left which could be transferred to C., and it could make no possible difference with this result whether C. was wholly ignorant of the prior conveyance, or was informed of it. Again, if A. has no estate at all, or only a defective one, he can not by a deed convey any more or better estate than he holds himself, to B., and it can make no difference whether the defect is open or hidden, or whether B. buys with knowledge or in ignorance of it. Arrison v. Harmstead, and Ruckman v. Decker, *supra*. These propositions are constantly illustrated in ejectment suits where the parties are claiming under conflicting legal titles, and both of them are purchasers for value and without notice. In Arrison v. Harmstead, *supra*, Rogers, J., said: "Where the vendor has nothing to convey, nothing can be acquired by the vendee. One who bought from the grantee in a *voidable* deed, *might* be in a better position than a vendor. But the principle did not apply to a sale by a vendor who had no title, or, what came to the same thing, who had avoided the title by his own wrong. A deed acquired surreptitiously without delivery, or altered after delivery, was invalid even in the hands of a *bona fide* purchaser." Again, in an action of ejectment between one who claims under deed or other paper title, and one who claims by adverse possession, the latter's notice of the outstanding paper title would not affect his right injuriously; the titles being legal, the controversy would be decided upon the completeness of the adverse possession, or the validity of the paper title.

[1] If A. owning the land, should convey it as a mere gift to B., by means of a conveyance sufficient in kind and form to transfer the legal estate, and so that no trust should result to himself, and should afterwards execute a deed in fee of the same land to C., who should pay a valuable consideration therefor, C. would obtain no interest whatever at the common law. The prior conveyance to B. would exhaust and transfer the entire fee, as fully as though a money price had been paid, and no interest would be left upon which C.'s deed could operate. The fact that C. paid value, and was ignorant of the former conveyance, could not destroy the legal effect of the prior deed, and create an estate which would pass to C. by *his* conveyance. It is entirely the result of statute that C.'s conveyance *may* under such circumstances obtain the precedence at law.

sentatives; provided that the act shall not extend to any conveyance made in good faith and for a valuable consideration to a person not having notice of the fraud.[1] The second class embraces the recording acts of the various states, by which it is generally provided that every conveyance of land which is not recorded, shall be deemed void as against a subsequent conveyance of the same land, made for a valuable consideration, which shall have been first put on record;[2] and also the similar statutes which postpone the lien of a prior undocketed judgment to that of a subsequent one which has been duly docketed.

§ 681. **(2) To Equitable Estates and Interests alone.**—The equitable doctrine concerning priorities resulting from the presence or absence of notice, or of a valuable consideration or other incident, by which a precedence may be given contrary to the mere order of time, applies to conflicting legal and equitable estates or interests in the same subject-matter, and to successive equitable estates, equitable interests such as liens and charges, and mere "equities," meaning thereby purely remedial rights, such as that of cancellation, reformation, and the like; and it applies to no other kind of estates, interests, or rights.[3]

§ 682. **II. Equitable Doctrine of Priority.**—Having thus stated the kind of interests to which alone the equitable doctrine applies, we shall next consider the nature, scope, and operation of the doctrine itself. In all of its phases, in all the instances where it may be invoked, the equitable doctrine concerning priorities is embodied in three most general and fundamental rules. *First.* Among successive equitable estates or

[1] Similar statutes have been enacted in the American states. For the force and effect of these statutes, both English and American, see Twyne's case, 3 Coke Rep. 80; 1 Smith Lead. Cas., p. 33 (7th Am. ed.); Sexton v. Wheaton, 8 Wheat. 229; 1 Am. Lead. Cas., p. 17 (4th Am. ed.); Doe v. Manning, 9 East, 59; Pulvertoft v. Pulvertoft, 18 Ves. 84. To these may be added the bankruptcy and insolvency acts in some of the states, which declare certain conveyances and transfers of the bankrupt or insolvent, to be void as against his assignee.

[2] See *ante*, § 646 and note. It is evident that all questions concerning legal conveyances, arising under the recording acts, questions depending upon the fact of recording or not recording, upon the record as notice, and upon the effect of an actual or constructive notice of a prior unrecorded deed given to a subsequent grantee, belong to the law, and do not constitute any part of equity jurisprudence. The estates are legal; the conflicting titles based upon recorded and unrecorded deeds, or involving the presence of notice in place of a record, are constantly settled by means of the legal action of ejectment. The effect of the recording acts upon mortgages, on the other hand, belongs to equity jurisprudence, since in any theory of the mortgage it creates an equitable estate or interest.

[3] Basset v. Nosworthy, Rep. temp. Finch, 102; 2 Eq. Lead. Cas. 1, 31, 46; Le Neve v. Le Neve, Ambl. 436; 2 Eq. Lead. Cas. 109, 117; Rice v. Rice, 2 Drew, 73; Thorndike v. Hunt, 3 De G. & J. 563; Cory v. Eyre, 1 De G. J. & S. 149, 167; Newton v. Newton, L. R., 6 Eq. 135.

interests. where there exists no special claim, advantage, or superiority in any one over the others, the order of time controls. Under these circumstances, the maxim, "Among equal equities, the first in order of term prevails," furnishes the rule of decision.[1] *Second.* Between a legal and equitable title to the same subject-matter, the legal title in general prevails, in pursuance of the maxim, "Where there is equal equity the law must prevail."[2] *Third.* The legal title being outstanding and not involved in the controversy, where there are successive *unequal* equities in the same subject-matter, as where there is a complete or perfect equitable estate and an incomplete or imperfect one, or a mere "equity," or where among equitable interests of a like intrinsic nature, one is affected by some incident or quality which renders it inferior to another, then the precedence resulting from order of time is defeated, and the superior equitable estate or interest prevails over the others; as is manifestly implied in the maxim, "Where there are *equal* equities, the first in order of time must prevail."[3]

§ 683. **III. Superior and Equal Equities.**—In determining the scope and operation of the foregoing rules, the discussion must largely consist in ascertaining when equities are *equal*, and when one is superior to another. It is impossible to define "equal equities" affirmatively by any exact formula. It is certainly not enough that two successive equitable interests in the same thing should be of *precisely the same nature*, for even then one might be accompanied by some collateral incident which gave it a precedence over the other without reference to their order of time. When we say that A. has a better equity than B., this means that according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B.; and therefore it is impossible that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance

[1] Rice v. Rice, 2 Drew. 73; Phillips v. Phillips, 4 De G. F. & J. 208, 215, per Lord Westbury; Cory v. Eyre, 1 De G. J. & S. 149, 167; Newton v. Newton, L. R., 6 Eq. 135, 140; 4 Ch. 143, 146; Shirras v. Caig, 7 Cranch, 34, 48; Boone v. Chiles, 10 Pet. 177; Watson v. Le Row, 6 Barb. 481, 485; Berry v. Mutual Ins. Co., 2 Johns. Ch. 603, 608; Lynch v. Utica Ins. Co., 18 Wend. 236, 253; Grosvenor v. Allen, 9 Paige, 74, 76; Downer v. The Bank, 39 Vt. 25; Bellas v. McCarty, 10 Watts, 13; Kramer v. Arthurs, 7 Barr. 165; Sumner v. Waugh, 56 Ill. 531; Pensonneau v. Bleakley, 14 Ill. 15.

[2] Thorndike v. Hunt, 3 De G. & J. 563, 570, 571; Fitzsimmons v. Ogden, 7 Cranch, 2, 18; Newton v. McLean, 41 Barb. 285; and see *ante*, § 417, cases cited in note.

[3] Basset v. Nosworthy, 2 Eq. Lead. Cas. 1; Le Neve v. Le Neve, 2 Eq. Lead. Cas. 109, 117, 144.

to either party as against the other.[1] Two persons have equal equitable interests in the same subject-matter, when each is equally entitled, with respect of his equitable interest, to the protection and aid of a court of equity. When the court is dealing with such successive equitable interests in the same subject-matter, and they are all thus equal, the priority in time determines the priority in right; and the fact that the holder of the subsequent interest, under these circumstances, acquired it without notice of the prior one, does not in general give him any right to be preferred.[2] The foregoing description of equal

[1] See Rice v. Rice, 2 Drew, 73.

[2] See *ante*, § 414, note (1), quotation from the opinion of Lord Westbury in Phillips v. Phillips, 4 De G. F. & J. 208, 215, which states this rule with great force and clearness. In Cory v. Eyre, 1 De G. J. & S. 149, 167, Turner, L. J. said: "Questions of priority between equitable incumbrancers are, in general, governed by the rule, *qui prior est tempore potior est jure;* and in determining cases depending on the rule we must of course look at the principle on which the rule is founded. It is founded, as I conceive, on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favor the trust is created or declared. Where, therefore, it is sought to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it. A vested estate or interest ought not to be disturbed on any light grounds." In Newton v. Newton, L. R., 6 Eq. 135, 140, Lord Romilly said: "These are simply equitable interests, and in such cases the prior interest must prevail over the subsequent. The fact that the owner of the subsequent equitable interest had no notice of the prior interest when he advanced his money, and took his security, does not affect the question. He could not take from the person who gave the charge on his interest more than his interest, and he could not give a charge on the interest of another person." This judgment was reversed on the evidence only by the court of appeal, but the law as thus laid down by the M. R. was expressly affirmed. See S. C., L. R., 4 Ch. 143, 146. In Jones v. Jones, 8 Sim. 633, which has been frequently cited with approval, A. mortgaged an estate first to B. (who by the English law of course acquired the legal title and received possession of the title-deeds), secondly to C., and thirdly to D. C. had no notice of the first mortgage. D. had notice of the first, but not of the second; and he caused notice of his mortgage to be given to B., who had the legal estate and possession of the title-deeds. *Held*, that he did not thereby acquire priority over C. Shadwell, V. C., stated the rule as follows: "At law the rule clearly is that different conveyances of the same tenement take effect according to their priority in time. The effect of different conveyances is the same as if different successive estates were granted by the same conveyance, first in possession and then in remainder. Equity follows the law; and where the legal estate is outstanding, conveyances of the equitable interest are construed and treated, in a court of equity, in the same manner as conveyances of the legal estate are construed and treated at law. In Beckett v. Cordley, 1 Bro. Ch. 353 (which Lord Eldon notices in Martinez v. Cooper, 2 Russ. 214), Lord Thurlow twice decided that, where the legal estate was outstanding in a first mortgagee, of two subsequent equitable incumbrancers, he who is prior in time must be prior in equity. His words are: 'The second equitable incumbrancer had the security he trusted to. He knew he had not the legal estate. He trusted to the honor of the borrower!'" These decisions, and the reasoning upon which they are based, show that one who purchases an equitable estate, or acquires an equitable interest, obtains only the right of his own vendor; the facts of his paying value and of not having notice, do not of

equities is not of much practical value, since it states the effects rather than the nature of equality. We shall, in fact, determine when equities are equal, by ascertaining when they are unequal, by learning what qualities or incidents render one equity superior to another equity in the same subject-matter.

§ 684. **Superior Equities Defined.**—It may be stated that so far as their intrinsic nature is concerned, a court of equity recognizes no inequality, based upon their form and mode of creation, among all perfected equitable interests based upon a valuable consideration and arising in any manner by which, in contemplation of equity, an interest in the very thing itself—the land, the chattels, or the fund—is created. If there is a valuable consideration, and an equitable interest in the very subject-matter itself *has been perfected*, it does not seem to affect their equalities, whether such interest arose from a declaration of trust, from an assignment, from a contract express or implied, or from acts such as the deposit of title-deeds. A valuable consideration is, however, a most important element. The whole history and scope of equity jurisprudence show that a valuable consideration is always regarded as a most essential requisite to the existence of complete equitable estates and interests of all kinds. Assuming this conclusion as generally, if not even universally, true, the various causes which will render one equity superior to another, may be formulated in three general rules. It will be seen that the first of these rules relates to the intrinsic nature of the two interests which are compared; the second relates, not to their nature, but to a quality inseparably connected with them, and constituting the occasion for their existence; the third relates neither to their nature nor qualities, but to a mere external or collateral incident affecting them at their origin. These three rules are as follows:

§ 685. **1. Nature of the Equities.**—The equitable interest created by a trust, or by a contract *in rem*, made upon a valuable consideration, is superior to the equity arising from a mere voluntary transfer—a mere gift, or from a mere judgment lien. In contemplation of equity, the interest created by a trust, or

themselves entitle him to take precedence over a prior vendee or incumbrancer; some quality imparting to his estate or interest an intrinsic superiority would be necessary to give him a preference. See Boone v. Chiles, 10 Pet. 177; Shirras v. Caig, 7 Cranch, 34, 48; Watson v. Le Row, 6 Barb. 481, 485; Bellas v. McCarty, 10 Watts, 13; Kramer v. Arthurs, 7 Barr, 165; Sumner v. Waugh, 56 Ill. 531; Pensonneau v. Bleakley, 14 Ill. 15. The recording acts may modify the operation of the equitable rule in this country, because they give to a recorded mortgage or other equitable incumbrance the very quality which imparts to it an intrinsic superiority, under the statute, over one which is not recorded.

by a valid executory contract of sale, or by a valid contract giving rise to a lien, or by an act in connection with such a contract constituting a lien—as for example, a deposit of title-deeds—is a real, beneficial interest *in the specific thing itself*, an interest which is property, or analogous to property;[1] and although such interest is not recognized by the law, it is treated by courts of equity as actually subsisting, and as binding upon the conscience of the original party who held the thing and who created the interest.[2] On the other hand, while the interest acquired by a transfer without consideration, by a voluntary gift, *may* be protected if it does not interfere with third persons, yet the voluntary transferee or donee can only receive whatever interest the donor was actually entitled in conscience and good faith to bestow; he never obtains, even as against the donor, and much less as against third persons dealing with the donor in respect to the same thing, any paramount right of his own. The consideration on the one side, and the absence of it on the other, lie at the very bottom of the equitable theory concerning actual rights.[3] The lien of a judgment is analogous to the claim of a donee; it is general, not specific. The beneficiary under a trust, the vendee under an agreement, the holder of a lien created by a contract *in rem*, deals concerning a specific thing; he parts with the consideration upon the security of that specific thing; he obtains an equitable interest in that specific thing. The judgment creditor has not dealt with that specific thing; he has not parted with value in contemplation of it; his lien is general and not confined to it. It is just, therefore, that, so far as their intrinsic natures are concerned, his claim should be considered as inferior to the interest arising from a trust or from a contract *in rem*. His lien only extends to what his debtor really has—that is, to the thing subject to all the equities in it existing at the date of the judgment.[4]

§ 686. (2) **Effects of Fraud.**—The equity acquired by a

[1] This is the fundamental distinction between the legal and the equitable view of executory contracts concerning some specific subject-matter. See *ante*, vol. 1, §§ 146–149, 161.

[2] See the quotation from Cory v. Eyre, 1 De G. J. & S. 149, 167, *ante*, under § 683.

[3] Green v. Givan, 33 N. Y. 343.

[4] It is settled in England, in accordance with this rule, that the interest of a *cestui que trust*, of the vendee under an executory contract, and of an equitable mortgagee by contract or by deposit of title-deeds, is superior to that of a subsequent judgment against the trustee, vendor, or mortgagor, even though the legal estate may have been acquired under the judgment by means of an *elegit*. Newlands v. Paynter, 4 My. & Cr. 408; Lodge v. Lyseley, 4 Sim. 70; Langton v. Horton, 1 Hare, 549, 560; Whitworth v. Gaugain, 3 Id. 416; 1 Phil. 728. This particular rule has been modified or altered by statute in several of the states. See *post*, §§ 721–724, where this subject is more fully examined.

party who has been misled, is superior to the interest in the same subject-matter of the one who willfully procured or suffered him to be thus misled. The following example illustrates the operation of this rule, and the principle underlying it may be generalized and applied to all analogous cases. A. being about to part with value to B. upon the security of B.'s estate, informs C. of his intention, and asks C. whether he has any incumbrance on the estate; C. denies that he has any, and A. relying upon this denial parts with money or other value to B.; in fact C. had at the time a mortgage or other incumbrance upon the estate; this mortgage or lien, although prior in time, would by reason of C.'s fraud be postponed to the subsequent interest acquired by A. The basis of this rule is the conduct which equity regards as constituting fraud, either an actual intention to mislead, or that gross negligence which produces all the effects and merits all the blame of intentional deception.[1] It is not, however, necessary that the party having an interest or title, under such circumstances, when applied to, should use positive misrepresentations or expressly deny the existence of his right; it is sufficient if he refrain from disclosing his claim, and suffer a third person to deal with the property as his own, or to acquire an interest in or lien upon it; he will not be permitted to set up or enforce his interest in preference to that obtained by the person whom he has suffered to be misled by his silence.[2]

§ 687. **And of Negligence.**—The rule extends to gross

[1] The rule is then stated in 1 Fonblanque on Eq., p. 64: "If a man by the suppression of the truth which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation." Berrisford v. Milward, 2 Atk. 49; Beckett v. Cordley, 1 Bro. Ch. 353, 357; Pearson v. Morgan, 2 Id. 384, 388; Mocatta v. Murgatroyd, 1 P. Wms. 393, 394; Evans v. Bicknell, 6 Ves. 174, 182, 183; Plumb v. Fluitt, 2 Anstr. 432; Lee v. Munroe, 7 Cranch, 366; Wendell v. Van Rensselaer, 1 Johns. Ch. 344, 354; Storrs v. Barker, 6 Id. 166, 168; Otis v. Sill, 8 Barb. 102; Lesley v. Johnson, 41 Id. 359; Crocker v. Crocker, 31 N. Y. 500; Lee v. Kirkpatrick, 1 McCart. Eq. 264; McKelvey v. Truby, 4 Watts & Serg. 323; Folk v. Beidelman, 6 Watts, 339; Schmitheimer v. Eiseman, 7 Bush, 298; Chapman v. Hamilton, 19 Ala. 121.

[2] Nicholson v. Hooper, 4 My. & Cr. 179; Wendell v. Van Rensselaer, 1 Johns. Ch. 344, 354; Storrs v. Barker, 6 Id. 166, 168, 169–172; Bright v. Boyd, 1 Story, 478. The same rule applies when under like circumstances a party having a prior claim knowingly permits another person to expend money on an estate or to make improvements upon it, without disclosing his own interest. Pilling v. Armitage, 12 Ves. 78, 84, 85; Cawdor v. Lewis, 1 Y. & C. Ex. 427; Williams v. Earl of Jersey, Cr. & Ph. 91; Chautauque Co. Bk. v. White, 6 Barb. 589; Bright v. Boyd, 1 Story, 478; Carr v. Wallace, 7 Watts, 394, 400.

negligence, which is tantamount in its effects to fraud. An equity otherwise equal or even prior in point of time, may, through the gross laches of its holder, be postponed to a subsequent interest which another person was enabled to acquire by means of such negligence.[1] To admit the operation of this rule, in either of its phases, and to displace the otherwise natural order of priority, there must be intentional deceit—that is, intentional misrepresentation or suppression of the truth, or else gross negligence. In the one case, the party possessing the claim which it is sought to postpone, must both know of his own right and also of the other person's intention to acquire, or of his acts in acquiring, an interest in the same subject-matter. In the other case there must be gross laches, for mere carelessness or ordinary negligence will not suffice according to the weight of modern authority.[2]

§ 688. **(3) Effects of Notice: Illustrations.**—The third, and in its practical effects by far the most important rule is, that a party taking with notice of an equity, takes subject to that equity. The full meaning of this most just rule is, that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim, or right, in or to the same subject-matter, held by a third person, is liable in equity to the same extent and in the same manner, as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer.[3] The applications of this rule are as numerous as are the various kinds of equitable interests. The following are some of the most important. A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in

[1] For example, A., a mortgagee of a leasehold estate, having the lease in his possession, loaned it to the mortgagor for the purpose of enabling him to obtain a further loan upon its security, but told the mortgagor to inform the person of whom he should borrow the money that he, A., had a prior lien. The mortgagor borrowed a sum from his bankers and deposited the lease with them as security, without informing them of A.'s mortgage. It was held that as A.'s gross negligence had enabled the mortgagor to perpetrate the fraud, his mortgage must be postponed to the lien of the bankers. Briggs v. Jones, L. R., 10 Eq. 92; Perry Herrick v. Attwood, 2 De G. & J. 21; Lloyd v. Attwood, 3 Id. 614; Waldron v. Sloper, 1 Drew. 193. See Fisher v. Knox, 1 Harris, 622; Campbell's Appeal, 5 Casey, 401; Garland v. Harrison, 17 Mo. 282.

[2] Hewitt v. Loosemore, 9 Hare, 449, 458; Colyer v. Finch, 5 H. L. Cas. 905; and see cases on the subject of constructive notice from a neglect to make sufficient inquiry, *ante*, §§ 606, 612.

[3] Le Neve v. Le Neve, Ambl. 436 (see extract from opinion of Lord Hardwicke, *ante*, § 591). For American cases see preceding section on notice.

the same manner as the original trustee from whom he purchased.[1] A purchaser or mortgagee with notice of the equitable lien of a vendor for unpaid purchase price, takes the land subject to that lien.[2] A purchaser or mortgagee of the legal estate, with notice of an equitable lien created by a deposit of title-deeds, or by a prior defective mortgage, or by any other means from which an equitable lien can arise, is bound by the lien.[3] A purchaser with notice of a prior contract to sell or to lease, takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution.[4] These examples are of ordinary occurrence.

§ 689. **Notice of a Prior Covenant.**—On the same principle, if the owner of land enters into a covenant concerning the land, concerning its use, subjecting it to easements or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which in law "runs with the land."[5]

[1] Burgess v. Wheate, 1 Eden, 177, 195; Bovey v. Smith, 1 Vern. 144; Saunders v. Dehew, 2 Id. 271; Wigg v. Wigg, 1 Atk. 382; Mead v. Lord Orrery, 3 Id. 235, 238; Mansell v. Mansell, 2 P. Wms. 672, 681; Mackreth v. Symmons, 15 Ves. 329, 350; Phayre v. Peree, 3 Dow, 116, 129; Adair v. Shaw, 1 Sch. & Lef. 248, 262; Dunbar v. Tredennick, 2 Ball & B. 304, 319; Pindall v. Trevor, 30 Ark. 249.

[2] Mackreth v. Symmons, 15 Ves. 329, 350; Grant v. Mills, 2 V. & B. 306.

[3] Birch v. Ellames, 2 Anstr. 427; Jennings v. Moore, 2 Vern. 609.

[4] Merry v. Abney, 1 Chan. Cas. 38; Ferrars v. Cherry, 2 Vern. 383; Daniels v. Davison, 16 Ves. 249; Crofton v. Ormsby, 2 Sch. & Lef. 583; Kennedy v. Daly, 1 Id. 355; Field v. Boland, 1 Dr. & Wal. 37; Potter v. Sanders, 6 Hare, 1; Greaves v. Tofield, L. R., 14 Ch. D. 563, 577, per Bramwell, L. J.

[5] Whatman v. Gibson, 9 Sim. 196; Schreiber v. Creed, 10 Id. 9; Tulk v. Moxhay, 11 Beav. 571; 2 Phil. 774, 777, *per* Lord Cottenham, holding that a covenant between a vendor and purchaser that the latter and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against purchasers with notice, without regard to the question whether it runs with the land; also explaining and correcting language used in Keppell v. Bayley, 2 My. & K. 517; Duke of Bedford v. The Trustees etc., Id. 552; Coles v. Sims, 5 De G. M. & G. 1, 8 (covenant prohibiting building except in a specified manner); Moxhay v. Inderwick, 1 De G. & Sm. 708; Western v. McDermot, L. R., 1 Eq. 499; 2 Ch. 72 (covenant by owners of adjoining houses to use their gardens in a certain manner); Clements v. Welles, L. R., 1 Eq. 200 (covenant by a lessee not to carry on a particular trade is binding on his under-lessee and on assignee of the under-lessee); Morland v. Cook, L. R., 6 Eq. 252 (purchaser bound by constructive notice of a covenant to keep up a sea-wall made between vendor and adjoining owners of lands on the sea-shore); Davies v. Sear, L. R., 7 Eq. 427 (purchaser bound by constructive notice of a right of way by implication); Feilden v. Slater, L. R., 7 Eq. 523 (a conveyance contained a covenant by the grantee not to use the premises "as an inn, public-house, or for the sale of spirituous liquors;" a lessee from the grantee was held

Notice, although a collateral incident, is thus, perhaps, the most powerful element in creating a superiority, and in disturbing an order of priority which would otherwise have existed. It may destroy the precedence which a legal estate ordinarily has over an equitable one; it may operate as well between legal and equitable estates in the same thing, as between successive estates or interests which are purely equitable.

§ 690. **(1) What is Notice.**—In the further discussion of this rule in its general form, three questions are to be considered: What is notice? At what time must it be received? and of what must it notify the party receiving it? The first of these questions, what is notice, has been fully examined in the preceding section. It is important to remember that actual notice, and constructive notice in any one of its varieties, produce exactly the same effects upon the equitable rights and liabilities of the party charged thereby; the general rule under consideration, equally includes both kinds within its operation.[1]

bound by such covenant); Wilson v. Hart, 2 H. & M. 551; 11 Jur. N. S. 735; L. R., 1 Ch. 463 (a grantee covenanted that "no building erected or to be erected on the" premises, should be used as a beer-shop, etc., the covenantor's *assigns not being named;* this covenant held binding on an assignee of the grantee); Keates v. Lyon, L. R., 4 Ch. 218, 224 (expressly recognizes all these decisions, but holds that the assignee was not bound because the covenant was personal, not running with the land, *and he had no notice of it,* either actual or constructive); Cooke v. Chilcott, L. R., 3 Ch. D. 694 (a grantee of land, on which was a spring, covenanted to erect a pump and reservoir on said land, and to supply water to houses to be erected on the grantor's adjoining land; held, that whether this covenant ran with the land or not, a purchaser from the grantee with notice of it was bound by it, and his violation would be restrained by a mandatory injunction); Richards v. Revitt, L. R., 7 Ch. D. 224 (covenant not to carry on certain trades); Luker v. Dennis, L. R., 7 Ch. D. 227 (covenant by the lessee of a public-house that he would buy all the beer consumed in that house and also in another house rented from a different person, from the lessor, who was a brewer; held binding in equity upon the assignee of the second named public-house, who had notice of the covenant); Keppel v. Bailey, 2 My. & K. 517 (declared to have been repeatedly overruled); Parker v. Nightingale, 6 Allen, 341, 344; Whitney v. Union R. R., 11 Gray, 359, 364, *per* Bigelow, J.: "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands *as an assignee* of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he can not equitably refuse to perform." Barrow v. Richard, 8 Paige, 351; Hills v. Miller, 3 Id. 254; Trustees etc. v. Cowen, 4 Id. 510; Wolfe v. Frost, 4 Sandf. Ch. 72; Brouwer v. Jones, 23 Barb. 153; Tallmadge v. East River B'k, 26 N. Y. 105; Gibert v. Peteler, 38 Id. 165; 38 Barb. 488; Phœnix Ins. Co. v. Continental Ins. Co., 14 Abb. Pr. (N. S.) 266; Trustees etc. v. Lynch, 70 N. Y. 440, 449-452 (in this case the question is elaborately discussed, and many of the authorities are examined by Allen, J.); Lattimer v. Livermore, 72 N. Y. 174; Greene v. Creighton, 7 R. I. 1; Kirkpatrick v. Peshine, 24 N. J. Eq. (9 C. E. Green) 206; Winfield v. Henning, 21 Id. (6 Id.) 188; St. Andrew's Church's Appeal, 67 Pa. St. (17 P. F. Sm.) 512; Norfleet v. Cromwell, 70 N. C. 634.

[1] See *ante,* Sec. V., §§ 591-676.

§ 691. **(2) Time of the Notice.**—At what time must notice be given to a party so that his right may be subordinate to the equity of which he is actually or constructively informed? In answering this question, the two following rules, already stated, must constantly be borne in mind: that among purely equitable interests which are equal, the order of time controls, so that the absence of notice can not give a subsequent equity any precedence over a prior one of equal standing; and that a trust or equity created by a contract *in rem* is superior to the interest acquired under a voluntary conveyance or transfer. It is plain then that the facts of the subsequent estate being legal rather than equitable, and of a valuable consideration having been actually paid, must play a most important part in determining the proper time of giving the notice. In the first place, therefore, the decisions, both English and American, are all agreed, that the notice received before the party has actually paid the money or parted with the other valuable consideration, is a valid and binding notice, and subjects his interest to the prior equity of which he is thereby notified; and this is true even though he has already taken a conveyance of the legal title and has given security for the purchase price even by an instrument under seal.[1] The reason is, that the conveyance of the legal estate is, under such circumstances, a voluntary one, because the agreement to pay the price, and the security given therefor, are, in reality, mere nullities. Although, originally, the party might have had no defense at law against a recovery of the amount agreed to be paid, he always had ample relief in a court of equity, which would decree the surrender and cancellation of the security, and perpetually enjoin any action at law for the price. In most of the American states the defense of a total failure of the consideration, under such circumstances, would now be available at law.[2] The rule as settled in England goes farther than this. It makes the notice binding upon the party if he receives it prior to his obtaining

[1] More v. Mahow, 1 Chan. Cas. 34; Jones v. Stanley, 2 Eq. Cas. Abr. 685, pl. 9; Story v. Lord Windsor, 2 Atk. 630; Tourville v. Naish, 3 P. Wms. 306; Collinson v. Lister, 7 De G. M. & G. 634; 20 Beav. 356; Wigg v. Wigg, 1 Atk. 382, 384; Tildesley v. Lodge, 3 Sm. & Giff. 543; Rayne v. Baker, 1 Giff. 241; Flagg v. Mann, 2 Sumn. 486; Murray v. Ballou, 1 Johns. Ch. 566; Penfield v. Dunbar, 64 Barb. 239; Farmers' Loan Co. v. Maltby, 8 Paige, 361; Haughwout v. Murphy, 21 N. J. Eq. (6 C. E. Green), 118; Union Canal Co. v. Young, 1 Whart. 410, 432; Patten v. Moore, 32 N. H. 382; Palmer v. Williams, 24 Mich. 328, 333; Blanchard v. Tyler, 12 Id. 339; Wilson v. Hunter, 30 Ind. 466; Keys v. Test, 33 Ill. 316; Brown v. Welch, 18 Id. 343; Bennett v. Titherington, 6 Bush. 192; Wells v. Morrow, 38 Ala. 125. See *post*, §§ 750, 755.

[2] Ibid.

the title by conveyance, although he may have parted with a valuable consideration before such notice. In other words, in order to be free from the effects of the notice, the party must have both paid the consideration and obtained the estate, before it was communicated.[1] In the United States a different, and as it seems to me more just, rule has generally been established; that where the estate subsequently purchased is the *legal* estate, a notice in order to be binding must be received before the purchaser pays the price or parts with the other valuable consideration. In other words, if he actually pays the valuable consideration without any notice, a notice afterwards given does not preclude him from completing the transaction, obtaining a conveyance of the legal title, and thereby securing the precedence due to a *bona fide* purchaser for a valuable consideration and without notice.[2] It should be carefully observed, however, that, notwithstanding this latter rule, upon the well-settled doctrines of equity, independently of modifying statutes, if the subsequent purchase is of an *equitable* interest merely, without the legal title, a payment of valuable consideration without notice can not of itself give the purchaser the precedence over a prior equity of an equal standing; the parting of value without notice does not alone constitute a superiority among successive equities so as to disturb the priority determined by order of time.

§ 692. (3) **Of What the Notice must Consist.**—It is not true that a notice of any and every species of right or claim will thus affect and subordinate the estate of the party receiving it. The notice required by the general rule under consideration must be of an actual equity, of something which equity regards as an interest in the subject-matter itself, although such may not be its nature in contemplation of the law.[3] Furthermore this interest must be of such a character that, if it were clothed, in the hands of its holder, with a legal title, it would be indefeasible. The fact that an interest is equitable shall not render it liable to be defeated by a party with notice of it, provided it would be indefeasible if legal. On the other hand, notice of a legal interest which is defeasi-

[1] Wigg v. Wigg, 1 Atk. 382, 384; Sharpe v. Foy, L. R., 4 Ch. 35, 40; Tildesley v. Lodge, 3 Sm. & Giff. 543; Rayne v. Baker, 1 Giff. 241; see *post*, § 755.

[2] See *post*, §§ 750, 755, and cases cited.

[3] For equity in many cases recognizes a real interest in the specific subject-matter—land, or chattels—where the law only admits a mere *personal* right or liability. This difference of conceptions is vital throughout the whole domain of equity jurisprudence.

ble, or of an equitable interest which, if legal, would be defeasible, does not bind the party receiving it, nor subordinate the estate in his hands.[1] The general rule as to the effect of notice must therefore include all trust estates express or implied, the equitable estate of the vendee in a contract for the sale of land, the equitable estate arising from the doctrine of conversion, equitable mortgages, liens, and charges, covenants creating equitable easements and servitudes, and the like. Notice, however, of a prior conveyance made with intent to defraud subsequent purchasers and declared void by the statute, will not affect the rights of a subsequent purchaser for value;[2] nor of a prior contract which the purchaser had *ab initio* a right to nullify.[3] Prior unrecorded conveyances and mortgages may appear to be exceptions to this rule, but are not in reality.[4] Having thus explained the fundamental principles upon which the equitable doctrine of priorities is based, I shall now describe some of the most important classes of cases in which these principles are applied.

§ 693. **Second. Applications of these Principles. Assignments of Things in Action.**—Where the creditor party in a thing in action assigns the debt to successive assignees, where a fund being held under a trust the *cestui que trust* assigns his interest therein to successive assignees, and where a person entitled thereto makes successive equitable assignments of a fund to different parties, the interests acquired by the assignees in each instance are equitable.[5] It might therefore appear, at first blush, that, as the legal estate is outstanding, and as the interests of all the successive assignees are similar in their essential nature, the general rule, "where there are equal equities,

[1] See Adams' Eq., p. 152 [323].

[2] Pulvertoft v. Pulvertoft, 18 Ves. 84; Buckle v. Mitchell, 18 Id. 100.

[3] Lufkin v. Nunn, 11 Ves. 170.

[4] They are apparent exceptions, because the prior unrecorded conveyances and mortgages are declared by the statute to be void as against subsequent purchasers whose deeds or mortgages are recorded, and the estates created by them appear therefore to be defeasible. They are not real exceptions, because by the judicial interpretation, which has even been incorporated into most of the modern American statutes, the chief object of the registry is to give a constructive notice, and a notice of any other kind merely supplies the place of that prescribed by the statute. See *ante*, §§ 659, 660, 665.

[5] This is unquestionably so in every case of an assignment by a *cestui que* trust, and of an equitable assignment of a fund. It was also true of all assignments of ordinary *choses in action*, debts, etc., until recent statutes in England and in this country have had the effect to clothe the assignee of debts, money demands, and other ordinary things in action with a legal right (see vol. 1, § 168). This legislation, however, has not affected the doctrines discussed in the text. These doctrines were settled while the interests were purely equitable, and have not been abrogated by the new jurisdiction at law.

the first in order of time must prevail," should govern them without regard to any notice which might or might not have been given to subsequent assignees; in other words, that under these circumstances, the maxim *qui prior est tempore potior est jure,* should control. There are, however, certain important elements which plainly distinguish these assignments from other kinds of successive equities, and remove them from the operation of the general rule. When an equitable interest in land is created, the holder thereof can often protect himself by a possession of the title-deeds in England, or by a registration in this country. When chattels are sold and transferred, the title of the purchaser is secured against all the world by a delivery. No such safeguards inhere in the assignments above mentioned.[1] The legal title or right analogous to possession remains vested in the debtor, trustee, or holder of the fund.

[1] The peculiar nature of such assignments, which distinguishes them from other equitable interests, was admirably described by Sir Thomas Plumer, M. R., in the leading case of Dearle v. Hall, 3 Russ. 1, 12: "Where a contract respecting property in the hands of other persons who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of, that is, by giving notice of the contract to those in whom the legal interest is. By such notice the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him and for no one else. That precaution is always taken by diligent purchasers and incumbrancers; if it is not taken there is neglect. The consequence of such neglect is that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it; he considers himself to be a trustee for the same individual as before, and no other person is known to him as the *cestui que trust.* The original *cestui que trust,* though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property, as absolutely as ever, so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those who may chance to deal with him, protect themselves from his fraud? Whatever diligence may be used by a subsequent incumbrancer or purchaser—whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right—the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees. To give notice is a matter of no difficulty; and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence."

The assignor—the creditor, or the *cestui que trust*—continues to be clothed with all the apparent right and power to deal with the claim, and to dispose of it to third persons, which he held prior to the assignment. Courts of the highest ability have, therefore, regarded such assignments as occupying a very special position, and have applied to them a special rule in determining their order of priority.

§ 694. **I. Notice by the Assignee.**—The reasons which prevail between the assignee and the debtor or the holder of the fund on the one hand, or subsequent assignees on the other, do not prevail between him and the assignor. It is therefore settled, that to render the assignment valid and perfect *as against the assignor himself*—that is, to give the assignee a complete claim upon the fund and right of action as against the assignor—no notice of the assignment need be given to the debtor, trustee, or other holder of the fund.[1] The same is true, according to many decisions, with respect to those who "stand in the shoes of" the assignor, namely, his judgment creditors, and mere volunteers under him.[2]

§ 695. **English Rule: Priority Determined by Notice to the Debtor Party.**—The rule is firmly established in England that, as against subsequent assignees for a valuable consideration, a notice to the debtor, trustee, or holder of the fund is necessary in order to perfect the assignment and render it valid and effectual.[3] Among successive assignees of the same thing

[1] Rodick v. Gandell, 1 De G. M. & G. 763, 780, *per* Lord Truro; *In re* Way's Trusts, 2 De G. J. & S. 365; Donaldson v. Donaldson, Kay, 711.

[2] Beavan v. Lord Oxford, 6 De G. M. & G. 492; Eyre v. McDowell, 9 H. L. Cas. 619, 642, 652; Kinderley v. Jervis, 22 Beav. 1; Scott v. Lord Hastings, 4 K. & J. 633; Pickering v. Ilfracombe Ry., L. R., 3 C. P. 235; Crow v. Robinson, L. R., Id. 264.

[3] This rule and the reasons for it were most forcibly stated by Sir Thos. Plumer, M. R., in the leading case of Dearle v. Hall, 3 Russ. 1, from which a quotation has already been made. He said (pp. 20–23): "The ground of this claim is priority of time. They rely upon the known maxim, which in many cases regulates equities—*qui prior est tempore, potior est jure.* If by the first contract all the thing is given, there remains nothing to be the subject of the second contract, and priority must decide. But it can not be contended that priority in time must decide, where the legal estate is outstanding. For the maxim, as an equitable rule, admits of exception, and gives way, when the question does not lie between bare and equal equities. If there appears to be, in respect of any circumstance independent of priority of time, a better title in the subsequent purchaser to call for the legal estate, than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference, which priority of date might otherwise have given, is done away with and counteracted. The question here is, not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sheering can set up? Or rather, the question is, shall these plaintiffs now have equitable relief to the injury of Hall?" [He shows that the failure of D. or S. to give notice was negligence; from this negligence all the doubt and difficulty

in action who have paid a valuable consideration, the mere order of time does not necessarily determine the priority; the assignee in good faith and for value who first gives a notice, obtains a precedence over the others, even though they may be earlier in time. The equities of the successive assignments being otherwise equal, the priority among them is determined by the order of the notices, rather than by the order of their dates. Giving notice is regarded as equivalent, or at least analogous to the act of taking possession. The rule thus formulated, is applied to assignments of ordinary things in action by the creditor party, including shares of stock in a company, insurance policies, and the like, to assignments of a fund held under a trust, by the *cestui que trust*, and to equitable assignments of a fund by the person entitled thereto, and the notice should be given, in the first class to the debtor, in the second, to the trustee, and in the third, to the holder of the fund.[1]

have arisen; and it is not equitable that they should take advantage of their own negligence, should obtain a benefit as the result of their neglect. He then adds (p. 22)]: "They say that they were not bound to give notice to the trustees; for that notice does not form part of the necessary conveyance of an equitable interest. I admit that if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract he with whom you are dealing is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice; and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is possession which determines the apparent ownership. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences. It is true that a chose in action does not admit of tangible actual possession. But in Ryall v. Rowles (1 Ves. sen. 348; 1 Atk. 165), the judges held that, in the case of a chose in action, you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person." This course of reasoning is, as it seems to me, completely unanswerable; the special rule concerning notice results from it as an irresistible conclusion. No other rule within the entire range of equity jurisprudence rests upon a more solid foundation of argument, or is more intrinsically just and reasonable.

[1] Dearle v. Hall, 3 Russ. 1; Loveridge v. Cooper, Id. 31; S. C., affirmed on appeal by Lord Lyndhurst, Id. 48–60; Ryall v. Rowles, 1 Ves. sen. 348; 1 Atk. 165; 2 Eq. Lead. Cas. 1533, 1579 (4th Am. ed.); Foster v. Blackstone, 1 My. & K. 297; 9 Bligh (N. S.) 332, 376; Meux v. Bell, 1 Hare,

It should be carefully observed, however, that to enable a subsequent assignee to obtain a priority in this manner, by giving the first notice to the debtor or legal holder, he must be an assignee in good faith and for a valuable consideration. If he parted with no consideration, he is a mere volunteer, and stands in the same position as his assignor. If he had notice of the earlier assignment, then he took subject thereto. The rule thus established by the uniform course of decision in England has been adopted in a portion of the American states.[1] It has been rejected by the courts of other states, which hold that among successive assignments of things in action the order of time controls.[2]

73, 84, 85; Saffron etc. Soc. v. Rayner, L. R., 14 Ch. D. 406 (what is a sufficient notice to trustees); *In re* Freshfield's Trusts, L. R., 11 Ch. D. 198, 200, 202, *per* Jessel, M. R. (rule applied when the second assignee of a trust fund who gave the first notice to the trustee, took his assignment from the executors of the *cestui que trust*, the first assignee having taken directly from the *cestui que trust* himself); *Ex parte* Garrard, L. R., 5 Ch. D. 61; 4 Id. 101 (the trustee himself the assignee); Addison v. Cox, L. R., 8 Ch. 76, 79, *per* Lord Selborne (a creditor assigned the money due to two different persons successively; these two assignees gave *simultaneous* notices to the debtor; held, that the first assignee had priority over the second); Lloyd v. Banks, L. R., 3 Ch. 488, 490, *per* Lord Cairns, reversing S. C., Id., 4 Eq. 222 (actual knowledge by the trustee of a first assignment by the *cestui que trust* operates as a notice, and gives the first assignee a priority over a second assignee who afterwards served a formal notice); see *per contra*, Edwards v. Martin, L. R., 1 Eq. 121, and *In re* Brown's Trusts, 5 Id. 88, which must be regarded as overruled so far as they differ from Lloyd v. Banks; Bridge v. Beadon, L. R., 3 Eq. 664, 667; *In re* Atkinson, 2 De G. M. & G. 140; *In re* Barr's Trusts, 4 K. & J. 219; Thompson v. Speirs, 13 Sim. 469; Martin v. Sedgwick, 9 Beav. 333. The time of giving the notice may be material. If it is given to a trustee before the fund comes into his possession, or before the trust relation exists, it will be wholly nugatory, while a subsequent notice given after the trust relation commences, or after the fund comes into the trustee's hands, will be operative. Somerset v. Cox, 33 Beav. 634; Webster v. Webster, 31 Id. 393; Addison v. Cox, L. R., 8 Ch. 76; Buller v. Plunkett, 1 J. & H. 441. If simultaneous notices are given by two assignees, the one who is earlier in date will have precedence. Calisher v. Forbes, L. R., 7 Ch. 109; Addison v. Cox, Id., 8 Id. 76, 79. Wherever an assignee earlier in time has done all in his power towards taking possession or perfecting his title, he will retain his priority. Feltham v. Clark, 1 De G. & Sm. 307; Langton v. Horton, 1 Hare, 549.

[1] Spain v. Hamilton's Ex'r, 1 Wall. 604, 624; Campbell v. Day, 16 Vt. 558; Barney v. Douglas, 19 Id. 98; Ward v. Morrison, 25 Id. 593; Loomis v. Loomis, 26 Id. 198, 204; Dale v. Kimpton, 46 Id. 76; Barron v. Porter, 44 Id. 587; Bishop v. Holcomb, 10 Conn. 444; Adams v. Leavens, 20 Id. 72; Foster v. Mix, 20 Id. 395; Van Buskirk v. Hartford etc. Ins. Co., 14 Id. 141, 144; Harrop v. Landers etc. Co., 45 Id. 561; Judah v. Judd, 5 Day, 534; Woodbridge v. Perkins, 3 Id. 364; Dews v. Olwill, 3 J. Bax. 432 (Tenn.); Flickey v. Loney, 4 Id. 169; Hobson v. Stevenson, 1 Tenn. Ch. 203; Gayoso Sav. Inst. v. Fellows, 6 Coldw. 467; Clodfelter v. Cox, 1 Sneed, 330; McWilliams v. Webb, 32 Iowa, 577; Murdoch v. Finney, 21 Mo. 138.

[2] Thayer v. Daniels, 113 Mass. 129; Bohlen v. Cleveland, 5 Mason, 174; Warren v. Copelin, 4 Metc. 594; Dix v. Cobb, 4 Mass. 508, 511; Wood v. Partridge, 11 Id. 488, 491; Littlefield v. Smith, 17 Me. 327; Stevens v. Stevens, 1 Ashm. 190; U. S. v. Vaughan, 3 Binn. 394; Muir v. Schenck, 3 Hill, 228; Beckwith v. Union B'k, 9 N. Y. 211; Kennedy v. Parke, 17 N. J. Eq. (2 C. E. Green), 415.

§ 696. **To Whom the Notice should be Given.**—Notice may be given to the debtor, trustee, or holder of the fund, either in writing or verbally, if the latter form is explicit, definite, and certain.[1] Notice to one of two or more co-trustees or joint debtors is, in general, notice to all; but it ceases to be operative when such trustee or debtor dies, or such trustee gives up his position.[2] Where shares of stock in a business corporation, or policy of insurance, are assigned, the notice required by the general rule should be given to a managing officer of the company.[3] If a fund is subject to successive trusts, the notice should be given to the trustee who has it under his actual control.[4]

§ 697. **The Rule does not Apply to Assignments of Equitable Interests in Land.**—Where a debt has been assigned, and the debtor refuses or fails to pay it, no notice of such non-payment is required to be given to the assignor in order that he may be made liable; the rules concerning notices to indorsers of negotiable paper do not apply.[5] Finally the special rule requiring a notice to the trustee or other holder of the legal title, in order to settle the priority among successive assignees, is confined to transfers of personal property, debts, money claims arising from contracts, funds, and the like; it does not extend to nor embrace assignments of any equitable estates or interests in land. These latter are governed by the more general rules concerning priority already stated.[6]

[1] *In re* Tichener, 35 Beav. 317; Browne v. Savage, 4 Drew. 635, 640. Notice can not be given by a mere conversation. Saffron etc. Soc. v. Rayner, L. R., 14 Ch. D. 406; *In re* Tichener, *supra*. How far a notice to attorneys of a trustee is operative, see Saffron etc. Soc. v. Rayner, *supra;* Willes v. Greenhill, 29 Beav. 376, 387, 392; Rickards v. Gledstanes, 3 Giff. 298.

[2] Meux v. Bell, 1 Hare, 73; *Ex parte* Rogers, 8 De G. M. & G. 271; Timson v. Ramsbottom, 2 Keen, 35; Willes v. Greenhill, 29 Beav. 376, 387; Wise v. Wise, 2 Jo. & Lat. 403. Where the trustee is himself the assignee from his *cestui que trust*, no further notice is necessary to gain priority over a subsequent assignee. *Ex parte* Garrard, L. R., 5 Ch. D. 61; 4 Id. 101; Elder v. Maclean, 3 Jur. N. S. 284. If one of several co-trustees is also a beneficiary, and assigns his interest to a third person, a notice to the other trustee is requisite; but if he assigns to one of his fellow-trustees, no notice is necessary as long as that trustee lives. Browne v. Savage, 4 Drew. 635; *In re* Selby, 8 De G. M. & G. 271; Willes v. Greenhill, 29 Beav. 376, 387, 391; Commrs v. Harby, 23 Id. 508. These decisions seem to be based upon mere verbal logic.

[3] Thompson v. Speirs, 13 Sim. 469; Edwards v. Martin, L. R., 1 Eq. 121; Martin v. Sedgwick, 9 Beav. 333. Notice of the assignment of a future cargo of a ship given to the master, has been held sufficient when followed by other steps to perfect the title of the assignee. Langton v. Horton, 1 Hare, 549; 3 Beav. 464.

[4] Bridge v. Beadon, L. R., 3 Eq. 664.

[5] Glyn v. Hood, 1 De G. F. & J. 334.

[6] See *ante*, §§ 682, 683; Jones v. Jones, 8 Sim. 633; Wiltshire v. Rabbitts, 14 Id. 76; Wilmot v. Pike, 5 Hare, 549; Lee v. Howlett, 2 K. & J. 531; McCreight v. Foster, L. R., 5 Ch. 604, 610, 611. In this case the

§ 698. **II. Diligence of the Assignee.**—Irrespective of any requirement to give notice in order to obtain a priority, the duty rests upon all assignees of things in action to use reasonable diligence in perfecting their titles or enforcing their rights. Even where the rule concerning notice to the debtor or trustee has not been adopted, an assignee who had otherwise the priority, may lose it through his laches, as against a subsequent purchaser in good faith and for value, who has been injured by the negligence.[1] It may be said, in general, that in order to pro-

vendee in a contract for the sale of land had agreed to assign the contract to A., and A. gave notice of such agreement to the vendor. It was held by Lord Hatherley, that the vendor might, notwithstanding such notice, receive payment of the balance of the price and convey the land to the original vendee; the notice did not affect the rights of the original contracting parties. An agreement to assign, would be treated in equity as an assignment.

[1] Spain v. Hamilton, 1 Wall. 604. See as illustrations of such neglect, and of its consequences, Judson v. Corcoran, 17 How. (U. S.) 612; Mercantile Ins. Co. v. Corcoran, 1 Gray, 75; Richards v. Griggs, 16 Mo. 416; Fraley's Appeal, 76 Pa. St. (26 P. F. Sm.) 42; Fisher v. Knox, 1 Harris, 622; Maybin v. Kirby, 4 Rich. Eq. 105. The rule that a subsequent assignee of a pure thing in action will be protected by a court of equity in any advantage which he has gained by his own diligence, or by the neglect of a prior assignee, is well illustrated by the case of Judson v. Corcoran, *supra*. One W. had a claim against Mexico, which became the subject of adjustment and award by commissioners acting under a treaty. In 1845 W. assigned this claim to Judson, who kept the transfer secret, gave no notice of it to any one, and took no steps whatever until 1851, when he brought this suit. After the assignment to Judson, W. assigned the claim to Corcoran, who had no knowledge or notice whatever of the prior transfer. He at once communicated a formal notice of his assignment to the U. S. secretary of state, which notice was filed with other papers in the case; he appeared and prosecuted the claim before the treaty commissioners, and obtained an award in his favor as the assignee of W. During all these proceedings Judson did not interpose any claim nor appear before the commissioners. After the award in 1851 he brought this suit against Corcoran to establish his own prior right, and to recover the amount awarded from Corcoran. The opinion of the court, *per* Catron, J., said: "Assuming that both sets of assignments are alike fair, and originally stood on the same *bona fide* footing, the rule of necessity is, that the assignor having parted with his interest by the first assignment, the second assignee could take nothing; and as he represents the assignor, is bound by the equities imposed on the latter; and hence has arisen the maxim in such cases, that he who is first in time is best in right. But this general rule has exceptions. [He then states the facts as given above, and proceeds.] Corcoran's assignment was fair, and without knowledge of Judson's. And assuming Judson's to be fair also, and that no negligence could be imputed to him, then the case is one where an equity was successively assigned in a chose in action to two innocent persons, whose equities are equal. Here Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside. Now nothing is better settled, than that this can not be done. The equities being equal, the law must prevail. There are other objections to the case made by Judson, growing out of the negligence on his part in not presenting his assignment and claim of property to the state department, so as to notify others of the fact. The assignment was held up, and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect on Corcoran, were priority accorded to it by our decree. It is certainly true, as a general rule, as above stated, that a purchaser of a chose in action, or of an equitable

tect himself against subsequent transfer by the assignor, where a notice is not given to the debtor or the holder of the legal interest, the assignee should obtain a delivery and possession of the written instrument which, in ordinary language, constitutes the thing in action, which embodies and is the highest evidence of the existing demand; or, when such delivery and possession are impossible from the very nature of the subject-matter, that he should take all the steps, permitted by the law, which are equivalent to actual possession.[1] The questions as

title, must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller; and yet, there may be cases in which a purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was from whom he bought." [He then gives as an illustration, the case of a subsequent assignee who *has* given notice to the debtor, while the first assignee has omitted to do so, according to the settled English rule, citing Dearle v. Hall, and other decisions, and adds:] "And the same principle of protecting subsequent *bona fide* purchasers of choses in action, against latent outstanding equities of which they had no notice, was maintained in this court in the case of Bayley v. Greenleaf, 7 Wheat. 46. That was an outstanding vendor's lien, set up to defeat a deed made to trustees for the benefit of the vendee's creditors. The court held it to be a secret trust; and although to be preferred to any other subsequent equity unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal title, still, it must be postponed to a subsequent equal equity connected with such advantage." The exact force of this decision should be carefully apprehended. It certainly is not an authority, as has sometimes been claimed, for the theory that assignments of things in action are never subject to outstanding equities in favor of third persons, but only to those in favor of the debtor. On the contrary it asserts in clear and express terms the *general* doctrine that assignments of choses in action are subject to such equities even though latent. To this general doctrine it announces certain exceptions, and carefully distinguishes the extent of these exceptions. They are as follows: (1) Where the second assignee, in good faith and without notice of the prior outstanding equity, protects or supports his own interest by obtaining a legal title or legal position; (2) Where the second assignee, although holding only an equitable interest, took without notice of the prior outstanding *secret* equity, and through the laches of the third person in delaying, or other similar conduct, or through his own diligence, the second assignee has acquired a position of advantage, so that it would be inequitable to deprive him of such advantage. In these cases, the general doctrine that an assignment is subject to outstanding equities of third persons does not apply. These considerations would go far to reconcile the conflict of decision described in subsequent paragraphs and notes.

[1] Ryall v. Rowles, 1 Ves. sen. 348, 352; Pinkerton v. Manchester etc. R. R., 42 N. H. 424. Thus between two successive assignees of a written thing in action, such as a policy of insurance, a bond, etc., both in good faith and otherwise equal, the one to whom possession of the instrument has been actually delivered, will obtain the precedence. Ancher v. Bank of England, Dougl. 637, 639; Wells v. Archer, 10 S. & R. 412; Ellis v. Kreutzinger, 27 Mo. 311.

On the same principle, if between two successive assignees of an equitable interest otherwise equal, the subsequent one acquires the legal title, or legal advantage, he thereby obtains the superiority. Ogden v. Fitzsimmons, 7 Cranch, 1, 18; Judson v. Corcoran, 17 How. (U. S.) 612; Downer v. The Bank, 39 Vt. 25, 29. This rule has been applied to subsequent transferees of shares of stock, who have perfected their titles by a record in the transfer book, and by the issue of a new certificate, as against prior assignees who have not taken these steps. Morris etc. Co. v. Fisher, 1 Stockt. Ch. 667; Craig v. Vicksburg, 31 Miss. 216; and see *infra*, §§ 712, 715.

to priority of right may arise between the assignee and a judgment creditor of the assignor or a subsequent purchaser from the assignor. There is a clear distinction between these two claimants; since a judgment creditor only succeeds to the rights of his debtor, while a purchaser *may* acquire higher rights.

§ 699. **Assignment of Shares of Stock: Between Assignee and Assignor.**—The question has very frequently arisen in this country in connection with transfers of shares of stock in business corporations. The by-laws of such companies generally, and even in some states the statutes, provide that an assignment of shares shall be consummated and perfected by the assignee's surrendering the original certificate to the proper officers of the corporation, and receiving a new one issued to himself, and by a record of the transaction entered in the company's transfer books. It is the common practice, however, to effect an assignment by delivering the certificate to the assignee, with a power of attorney indorsed thereon executed by the assignor, authorizing the surrender to be made and all the other steps to be taken as prescribed by the by-laws. This method of transfer, according to the overwhelming weight of authority, clothes the assignee with a full legal ownership as against the assignor, and with an equitable title and ownership valid at least as against the corporation.[1] The only important questions, therefore, relate to the right and priority of such an assignee as against judgment creditors of the assignor and subsequent purchasers.

§ 700. **The Same: Between Assignee and Judgment Creditors of Assignor.**—It has been held by some courts that such a transfer of shares by a mere delivery of the certificate

[1] N. Y. & N. H. R. R. v. Schuyler, 34 N. Y. 30, 80, *per* Davis, J.; Comm. B'k v. Kortright, 22 Wend. 348; Cushman v. Thayer Man. Co., 76 N. Y. 365, 371; Dunn v. Commer. B'k, 11 Barb. 580; McCready v. Rumsey, 6 Duer, 574; People v. Elmore, 35 Cal. 653; Parrott v. Byers, 40 Id. 614; People v. Crockett, 9 Id. 112; Mt. Holly Co. v. Ferree, 17 N. J. Eq. (2 C. E. Green) 117. The rule is concisely stated by Davis, J., in the Schuyler case, *supra*, as follows: "Where the stock of a corporation is, by the terms of its charter or by-laws, transferable only on its books, the purchaser who receives a certificate with power of attorney, gets the entire title legal and equitable as between himself and the seller, with all the rights the latter possessed; but as between himself and the corporation he acquires only an equitable title which they are bound to recognize and permit to be ripened into a legal title, when he presents himself, before any effective transfer on the books has been made, to do the acts required by the charter or by-laws. Until those acts are done, he is not a stockholder, and has no claim to act as such, but he possesses, as between himself and the corporation, by virtue of the certificate and power, the right to make himself or whomsoever he chooses a stockholder, by the requisite transfer."

and power of attorney, without the further steps for completing the transaction on the transfer books, *and without any notice thereof given to the company*, is presumptively fraudulent, and therefore invalid as against judgment creditors of the assignor.[1] A different rule, however, must be regarded as settled by the great majority of decisions, which hold that this mode of assignment is valid as against creditors of the assignor, and gives the assignee a precedence over their subsequent judgments, executions, and attachments.[2]

§ 701. **The Same: Between Assignee and Subsequent Purchasers.**—As between such an assignee and subsequent purchasers, the question is more complicated. I think that general language has sometimes been used by judges, which indicates a confusion of mind with reference to the real situation of the parties, and the *possible* circumstances which might arise in the transaction. If the holder of shares should deliver the certificate with a power of attorney executed by himself, it would be impossible for him to clothe a subsequent assignee with the same indicia of ownership, so that the latter should have a title apparently equal to the former. On the other hand, if the holder of shares should assign them verbally or by a written instrument to A., but without delivering the certificate and power of attorney, and should afterwards assign them in the ordinary manner, by delivering the certificate with a power of attorney, to B., the apparent title of the latter would certainly be superior to that of the former. It does not

[1] Pinkerton v. Manchester etc. R. R., 42 N. H. 424; Shipman v. Ætna Insurance Co., 29 Conn. 245; but see Colt v. Ives, 31 Id. 25. These cases, it will seen, arose in states which have adopted the English rule concerning notice of an assignment. Similar decisions have been made in Massachusetts, but based entirely upon the express language of a statute. Fisher v. Essex B'k, 5 Gray, 373; Blanchard v. Dedham Gas Co., 12 Id. 213. The same rule has been laid down by the courts in California and is rested upon the statutes; these do not, however, materially differ from the provisions of statutes, charters, and by-laws in other states. Weston v. Bear River etc. Co., 5 Cal. 186; S. C., 6 Id. 425, 429; Naglee v. Pacific Wharf Co., 20 Id. 530, 533; People v. Elmore, 35 Id. 653, 655.

[2] This conclusion is in complete harmony with the doctrine of those recent English cases, cited *supra*, § 694, which hold that an assignment, *although without notice to the debtor*, or trustee, has priority over judgment creditors of the assignor. The rule given in the text is sustained by the following, among other decisions. Mt. Holly Co. v. Ferree, 17 N. J. Eq. (2 C. E. Green), 117; Rogers v. N. J. Ins. Co., 4 Halst. Ch. 167; Broadway B'k v. McElrath, 2 Beas. 24; Commer. B'k v. Kortright, 22 Wend. 348; McNeil v. Tenth Nat. B'k, 46 N. Y. 325; Grymes v. Hone, 49 Id. 17, 22; Comm. v. Watmough, 6 Whart. 117; U. S. v. Vaughn, 3 Binney, 394; People v. Elmore, 35 Cal. 653; Dale v. Kimpton, 46 Vt. 76 (what is sufficient notice to the debtor to protect an assignee against attachments and executions by creditors of the assignor; casual information or knowledge may be sufficient); See also, U. S. v. Vaughan, 3 Binney, 394; Stevens v. Stevens, 1 Ashmead, 190; Dix v. Cobb, 4 Mass. 508.

seem possible, therefore, that a question of priority, on the assumption that their equitable interests are intrinsically equal, can arise between two successive assignees of the same shares from the same owner, where the assignment to one of them has been by a delivery of the certificate with a power of attorney. The questions of precedence among successive transfers executed in such a manner, must arise in cases where the earlier assignment, apparently made by and in the name of the owner, is procured through fraud, breach of trust, or even forgery.[1] The discussion of this particular topic properly belongs, and will be found, in the next subdivision, which treats of the equities to which assignments of things in action are subject.[2]

§ 702. **Notice to the Debtor Necessary to Prevent Subsequent Acts by Him.**—Diligence is also necessary on the part of the assignee, in order to protect his right, by giving prompt notice of the transfer to the debtor, trustee, or other holder of the fund. Until notice, actual or constructive, is received by the debtor, or trustee, payment by him to the assignor would be a valid payment of the claim, and binding upon the assignee. The same would be true of a release from the assignor to the debtor or trustee, or any other transaction between them which would operate as a legal discharge; it would also be a discharge as against the assignee, if done before notice.[3] It is expressly provided in many of the states, that a demand in favor of the debtor, which might be a set-off against the assignor, not existing at the date of the assignment, but arising subsequently *and before notice to the debtor*, shall be a valid set-off against the assignee.[4]

§ 703. **III. Assignments of Things in Action Subject to Equities.**—The doctrine stated in its most comprehensive form is, that an assignment of every non-negotiable thing in action, even when made without notice of the defect to the assignee, is subject in general to all equities existing against the assignor. This broad doctrine has three different applications: (1) Where the equities are in favor of the debtor, or trustee; (2) Where

[1] Mt. Holly Co. v. Ferree, 17 N. J. Eq. (2 C. E. Green), 117; Bank of Commerce's Appeal, 73 Pa. St. (23 P. F. Sm.) 59, 64; Sabin v. B'k of Woodstock, 21 Vt. 353; McNeil v. Tenth Nat. B'k, 46 N. Y. 325.

[2] See *infra*, §§ 707-715.

[3] Bishop v. Garcia, 14 Abb. Pr. (N. S.) 60; Loomis v. Loomis, 26 Vt. 198; Campbell v. Day, 16 Vt. 558; Rider v. Johnson, 8 Harris, 190; Louden v. Tiffany, 5 Watts & S. 367; Stocks v. Dobson, 4 De G. M. & G. 11; Norrish v. Marshall, 5 Madd. 475; Van Keuren v. Corkins, 66 N. Y. 77, 79, 80; Kellogg v. Smith, 26 Id. 18; Reed v. Marble, 10 Paige, 409; N. Y. Life Ins. etc. Co. v. Smith, 2 Barb. Ch. 82; James v. Morey, 2 Cow. 246; Atkinson v. Runnells, 60 Me. 440; Upton v. Moore, 44 Vt. 552; Cook v. Mut. Ins. Co., 53 Ala. 37; Brashear v. West, 7 Pet. 608; Muir v. Schenck, 3 Hill, 228.

[4] See *infra*, § 705.

they arise between successive assignors and assignees—that is, in favor of some prior assignor; (3) Where they arise entirely in favor of third persons—the two latter cases including what are often called *latent* equities. As these three applications depend upon *somewhat* different grounds, and as there is not a perfect harmony of decision concerning them, it will be expedient to discuss them separately, and thus to avoid all unnecessary doubt with respect to the settled rules.

§ 704. **1. Equities in Favor of the Debtor Party.**—The rule is settled, by an unbroken series of authorities, that the assignee of a thing in action not negotiable, takes the interest assigned subject to all the defenses legal and equitable of the debtor who issued the obligation, or of the trustee or other party upon whom the obligation originally rested. That is, when the original debtor, or trustee, in whatever form his promise or obligation is made, if it is not negotiable, is sued by the assignee, the defenses legal and equitable which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, avail to him against the substituted creditor.[1] This rule applies to all forms of contract

[1] See Pomeroy on Remedies, § 157; Callanan v. Edwards, 32 N. Y. 483, 486, *per* Wright, J.: "An assignee of a chose in action not negotiable, takes the thing assigned subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or to the time when notice of it was given, when there is an interval between the execution of the transfer and the notice." See also, Ingraham v. Disborough, 47 N. Y. 421; Wanzer v. Cary, 76 Id. 526; Andrews v. Gillespie, 47 Id. 487; Bush v. Lathrop, 22 Id. 535, 538, *per* Denio, J.; Reeves v. Kimball, 40 Id. 299; Commer. B'k v. Colt, 15 Barb. 506; Western B'k v. Sherwood, 29 Id. 383; Barney v. Grover, 28 Vt. 391; Kamena v. Huelbig, 23 N. J. Eq. (8 C. E. Green), 78; Bank v. Fordyce, 9 Barr. 275; Ragsdale v. Hagy, 9 Gratt. 409; Martin v. Richardson, 68 N. C. 255; Andrews v. McCoy, 8 Ala. 920; Jeffries v. Evans, 6 B. Mon. 119; Kleeman v. Frisbie, 63 Ill. 482; Boardman v. Hayne, 29 Iowa, 339; Norton v. Rose, 2 Wash. (Va.) 233; Brashear v. West, 7 Pet. 608; Wood v. Perry, 1 Barb. 114, 131; Ainslie v. Boynton, 2 Id. 258, 263; Frants v. Brown, 17 S. & R. 287; Jordan v. Black, 2 Murph. (N. C.) 30; McKinnie v. Rutherford, 1 Dev. & Bat. Eq. 14; Moody v. Sitton, 2 Ired. Eq. 382; Lackay v. Curtiss, 6 Id. 199; Turton v. Benson, 1 P. Wms. 497; 2 Vern. 764; Coles v. Jones, 2 Vern. 692; Priddy v. Rose, 3 Meriv. 86; Athenæum etc. Soc. v. Pooley, 3 De G. & J. 294; Stocks v. Dobson, 4 De G. M. & G. 11; Aberaman Iron Works v. Wickens, L. R., 5 Eq. 485, 516, 517; 4 Ch. 101; Graham v. Johnson, L. R., 8 Eq. 36; *Ex parte* Chorley, Id., 11 Eq. 157; *In re* China etc. Co., Id., 7 Eq. 240; *In re* Natal etc. Co., Id., 3 Ch. 355; *Ex parte* New Zealand B'k, Id. 154; Houlditch v. Wallace, 5 Cl. & Fin. 629; Rolt v. White, 31 Beav. 520; Smith v. Parkes, 16 Id. 115; Cockell v. Taylor, 15 Id. 103; Dibbs v. Goren, 11 Id. 483. Upon the question whether the doctrine stated in the text applies to mortgages given to secure negotiable promissory notes—a form of security very common in some states—the authorities are in direct conflict. In one class of decisions it has been held that, where a mortgage is given to secure a negotiable promissory note, and before maturity of the note, it and the mortgage are assigned to a *bona fide* purchaser for value, the assignment of the mortgage as well as of the note is free from all equities subsisting between the original parties, in favor of the mortgagor. Carpenter v. Longan, 16 Wall. 271, 273; Kenicott v. Supervisors, 16 Id. 452, 469; Taylor v. Page, 6 Allen, 86; Reeves v. Scully,

not negotiable, and to all defenses which would have been valid between the debtor party and the original creditor. These defenses may arise out of or be inherent in the very terms or nature of the obligation itself, as that it was conditional and the condition has not been performed by the assignor, failure or illegality of the consideration, and the like; or they may exist outside of the contract, as set-off, payment, release, the condition of accounts between the original parties, and the like. Some examples are given in the foot-note by way of illustration.[1]

Walk. Ch. 248; Croft v. Bunster, 9 Wisc. 503, 509; Cornell v. Hichens, 11 Id. 353; Fisher v. Otis, 3 Chand. 83; Martineau v. McCollum, 4 Id. 153; Potts v. Blackwell, 4 Jones Eq. 58; Bloomer v. Henderson, 8 Mich. 395; Cicotte v. Gagnier, 2 Id. 381; Pierce v. Faunce, 47 Me. 507. Other cases reach exactly the opposite conclusion, and hold that the assignment of such a mortgage is governed by the general rule. Kleeman v. Frisbie, 63 Ill. 482; Bryant v. Vix, .83 Id. 11; Baily v. Smith, 14 Ohio St. 396. The reasoning of these Illinois decisions is, in my opinion, most in accordance with the settled doctrines of equity jurisprudence; namely, that the assignment of the mortgage, whether it be an incident of the transfer of the note, or be direct, is wholly equitable, and gives only an equitable title to the assignee, and must therefore be subject to all subsisting equities; the doctrine of *bona fide* purchase for a valuable consideration not applying to transfers of mere equitable interests.

[1] *Of the Kinds of Contract.*—Shares and obligations of corporations. *In re* China etc. Co., L. R., 7 Eq. 240; *In re* Natal etc. Co., Id., 3 Ch. 355. Bonds or bonds and mortgages. Turton v. Benson, 1 P. Wms. 497; Western B'k v. Sherwood, 29 Barb. 383. A warehouseman's receipt. Commer. B'k v. Colt, 15 Barb. 506. Assignment for benefit of creditors. Marine B'k v. Jauncey, 1 Barb. 486; Maas v. Goodman, 2 Hilt. 275. Contract for the sale of land in an action for a specific performance by an assignee of the vendee. Reeves v. Kimball, 40 N. Y. 299.

Of Defenses.—In an action on a bond and mortgage by the assignee, the defense that they were given on consideration that the mortgagee should perform certain covenants contained in a collateral agreement between himself and the mortgagor, and that he had wholly failed to perform them, was sustained. Western B'k v. Sherwood, 29 Barb. 383. Failure or illegality of the consideration, or that the assigned obligation was given as collateral security for a debt which has been paid. Ellis v. Messervie, 11 Paige, 467; Weaver v. McCorkle, 14 Serg. & R. 304; McMullen v. Wenner, 16 Id. 18. That the bond or other obligation assigned had been wholly or partially satisfied. Simson v. Brown, 68 N. Y. 355, 361; Kelly v. Roberts, 40 Id. 432; Turton v. Benson, 1 P. Wms. 497; Rolt v. White, 31 Beav. 520; Smith v. Parkes, 16 Id. 115; Ord v. White, 3 Id. 357. A set-off existing in favor of the debtor at the time of the assignment or notice thereof. Loomis v. Loomis, 26 Vt. 198; Campbell v. Day, 16 Id. 558; Rider v. Johnson, 8 Harris, 190; Louden v. Tiffany, 5 Watts & S. 367; Moore v. Jervis, 2 Coll. 60; Stephens v. Venables, 30 Beav. 625; Willes v. Greenhill, 29 Id. 376, Cavendish v. Geaves, 24 Id. 163, 173. Where money coming due on a contract is assigned, the assignee's claim is subject to all the conditions and terms of the contract. Tooth v. Hallett, L. R., 4 Ch. 242; Myers v. United etc. Ass. Co., 7 De G. M. & G. 112; Bristow v. Whitmore, 9 H. L. Cas. 391. An assignment by a stockholder of his shares or of corporation obligations, is subject to all equities and claims with respect thereto existing against him in favor of the company at the date of the transfer. *In re* Natal etc. Co., L. R., 3 Ch. 355; *In re* China Steamship Co., Id., 7 Eq. 240; Kleeman v. Frisbie, 63 Ill. 482 (assignment of a mortgage or deed of trust given to secure a negotiable promissory note is subject to all equities); Parmalee v. Wheeler, 32 Wisc. 429 (assignment of a judgment, ditto); Broadman v. Hayne, 29 Iowa, 339 (of an order made by a board of school trustees); Downey v. Tharp, 63

It is essential, however, that the equity in favor of the debtor should exist at the time of the assignment or before notice thereof; after receiving notice, he can not by a payment, release, obtaining a set-off, or any other act, defeat or prejudice the right of the assignee. The debtor who would have been entitled to equities under this rule, may, by a writing, or by actual misrepresentations, or by conduct, or even by silence, towards the assignee, estop himself from setting them up, and he may release them.[1]

§ 705. **Statutory Provision: Codes of Procedure.**—Since the general doctrine concerning the rights of the debtor parties as against assignees has been expressly recognized and preserved in all the codes and practice acts of the states and territories which have adopted the reformed procedure, it will be proper to exhibit, in a very brief manner, the results of the judicial interpretation put upon these statutory provisions, although they apply to legal as well as to equitable actions. The

Pa. St. (13 P. F. Sm.) 322 (what is not such an equity or defense. Where a demand has been twice assigned, the debtor can not set off as against the second assignee a claim against the first.) It is held in Massachusetts, under the Gen. Stat., c. 161, § 64, that when the creditor assigns a note and mortgage given as collateral security for a debt, after the debt so secured had been paid, to an assignee for a valuable consideration and without notice, the title of such innocent assignee is not affected by the fraud of his assignor, and is therefore good as against the mortgagor. Draper v. Saxton, 118 Mass. 427. Also in McMasters v. Wilhelm, 85 Pa. St. 218, it is held that the assignee of a mortgage is not affected by a collateral agreement between the mortgagor and mortgagee, made at the time of executing the mortgage, and of which he had no notice. See, as further illustrations of the doctrine stated in the text, Allen v. Watt, 79 Ill. 284; Hall v. Hickman, 2 Del. Ch. 318.

[1] As where the maker of an accommodation note represents, to one who is about to discount it at more than the legal rate of interest, that it is business paper, and thereby estops himself from setting up the defense of usury in its inception. Representation under similar circumstances, that the obligation about to be assigned was given upon a valuable consideration, would estop the debtor from relying upon the actual want of consideration as a defense. *In re* Northern etc. Co., L. R., 10 Eq. 458, 463; *In re* Agra etc. B'k, Id., 2 Ch. 391; *In re* General Estates Co., Id., 3 Id. 758; *In re* Blakeley Ordnance Co., Id. 154; Higgs v. Northern etc. Co., L. R., 4 Exch. 387; Watson's Ex'rs v. McLaren, 19 Wend. 557; Sargeant v. Sargeant, 18 Vt. 371; Bank v. Jerome, 18 Conn. 443; Jones v. Hardesty, 10 Gill & J. 404. Where A. executed a bond and mortgage purporting to be for $20,000 to B., but which was actually without any consideration, and C. bought the security at a large discount (for $16,000) upon the faith of a written statement by M. that the amount expressed in the instrument was the true consideration; held, that M. was estopped from asserting a want of consideration to the full extent of the face of the bond and mortgage. Grissler v. Powers, 81 N. Y. 57; see, also, as illustrations of such estoppel, Ashton's Appeal, 73 Pa. St. (23 P. F. Sm.) 153, 161, 162; Twitchell v. McMurtrie, 77 Id. (27 Id.) 383; Scott v. Sadler, 52 Id. (2 Id.) 211; Weaver v. Lynch, 1 Casey, 449; McMullen v. Wenner, 16 Serg. & R. 18; Kellogg v. Ames, 41 N. Y. 259; Holbrook v. N. J. Zinc Co., 57 Id. 616, 622, 623; Petrie v. Feeter, 21 Wend. 172; Hall v. Purnell, 2 Md. Ch. 137; Foot v. Ketchum, 15 Vt. 258; King v. Lindsay, 3 Ired. Eq. 77.

provision found in the various codes is substantially as follows: "In the case of an assignment of a thing in action, the action of the assignee shall be without any prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section shall not apply to negotiable promissory notes, and bills of exchange [and negotiable bonds, Ohio, Kansas, Nebraska], transferred in good faith and upon good consideration before due."[1] In Ohio, Kansas, Nebraska, and Washington the language is: "The action of the assignee shall be without prejudice to any set-off or other defense now allowed."[2]

§ 706. **Same, Continued.**—The defenses which this clause admits, should be carefully distinguished from counter-claims subsequently provided for by the codes. This section speaks of defenses, which simply prevent the plaintiff from succeeding, and may be available against an assignee, as well as against the original creditor. The counter-claim assumes a right of action against and demands affirmative relief from the plaintiff, and is, therefore, impossible as against an assignee suing, if it existed against the assignor. It was not intended by the codes to alter the substantial rights of parties, but only to introduce such modifications into the modes of protecting them as were rendered necessary by the preceding section requiring the real party in interest in most cases to be the plaintiff. Taking the two sections together, the plain interpretation of them is: The assignee of a thing in action must sue upon it in his own name, but this change in the practice at law shall not work any alteration of the actual rights of the parties; the defendants are still entitled to the same defenses against the assignee who sues, which they would have had if the former legal rule had continued to prevail, and the action had been brought in the name of the assignor, but to no other or different defenses. This construction is now firmly and universally established.[3] I have placed in the foot-note a number of decisions involving the meaning and effect of this statutory provision, and relating especially to the *time* at which the set-off or other defense must exist, in order that it may be available against the assignee.[4]

[1] New York (old code), § 112; (new code), §——; Minnesota, § 27; California, § 368; Wisconsin, ch. 122, § 13; Indiana, § 6; Kentucky, § 31; South Carolina, § 135; North Carolina, § 55; Oregon, §§ 28, 382; Nevada, § 5; Iowa, § 2546; Dakota, § 65; Idaho, § 5; Montana, § 5; Washington, § 3; Wyoming, § 33; Arizona, § 5.

[2] Ohio, § 26; Kansas, § 27; Nebraska, § 29; Washington, § 3, slightly varied.

[3] Beckwith v. Union B'k, 9 N. Y. 211, 212, *per* Johnson, J.; Myers v. Davis, 22 N. Y. 489, 490, *per* Denio, J.

[4] *Set-off.*—There is a difference among these decisions. In some it is held that the assigned claim, and the claim in favor of the defendant, must both be existing demands, due and

§ 707. 2. **Equities between Successive Assignors and Assignees.**—The doctrine is not confined to the case of the debtor party setting up a defense against an assignee; it also applies, when the same non-negotiable thing in action has gone through successive assignments, to the second and subsequent assignees, if there were equities subsisting between the original assignor—or *any* prior assignor—and his immediate assignee in favor of the former. The instances of this application include the following among other circumstances; when the owner transfers the thing in action upon condition, or subject to any reservations, and this immediate assignee transfers it absolutely; when the first assignment is accomplished by a forgery of the owner's name, and this assignee afterwards transfers to an innocent purchaser for value; when the original assignment is procured by fraud, duress, or undue influence, and a second assignment is then made to a purchaser for value and without notice; when the original assignment is regular on its face, executed in the name of the owner and by means of his signature voluntarily written, but the transfer is consummated through a breach of fiduciary duty by an agent or bailee contrary to the owner's intention, and this immediate assignee transfers to an innocent holder; and finally, when the original owner assigns the same thing in action for value and without notice first to A. and afterwards to B., and the controversy is between these two claimants, or between subsequent assignees from, and deriving

payable at the date of the assignment, and that it is not sufficient for the latter to become a demand due and payable after the assignment, but before notice thereof. In others it is held, that a debt existing in favor of the defendant and becoming due and payable against the assignor *at any time before notice of the assignment* constitutes a valid set-off. The rule concerning equitable set-off, when the assignor is insolvent, is also admitted in several of these cases. Beckwith v. Union B'k, 9 N. Y. 211; Myers v. Davis, 22 Id. 489, 490; Martin v. Kuntzmuller, 37 Id. 396; Barlow v. Myers, 64 Id. 41, reversing 6 N. Y. Sup. Ct. 183; Roberts v. Carter, 38 N. Y. 107; Robinson v. Howes, 20 Id. 84; Merrill v. Green, 55 Id. 270, 274; Frick v. White, 57 Id. 103; Blydenburgh v. Thayer, 3 Keys, 293; Williams v. Brown, 2 Id. 486; Watt v. Mayor etc., 1 Sandf. 23; Wells v. Stewart, 3 Barb. 40; Ogden v. Prentice, 33 Id. 160; Maas v. Goodman, 2 Hilt. 275; Lathrop v. Godfrey, 6 T. & C. 96; Adams v. Rodarmel, 19 Ind. 339; Morrow's Assignees v. Bright, 20 Mo. 298; Walker v. McKay, 2 Metc. (Ky.) 294; Gildersleeve v. Burrows, 24 Ohio St. 204; Norton v. Foster, 12 Kans. 44, 47, 48; Leavenson v. Lafontaine, 3 Id. 523, 526; Harris v. Burwell, 65 N. C. 584; Richards v. Daily, 34 Iowa, 427, 429; Smith v. Fox, 48 N. Y. 674; Smith v. Felton, 43 Id. 419; Bradley v. Angell, 3 Id. 475, 478; Chance v. Isaacs, 5 Paige, 592; Martin v. Richardson, 68 N. C. 255, and cases cited; McCabe v. Grey, 20 Cal. 509; Herrick v. Woolverton, 41 N. Y. 581; Miller & Co. v. Florer, 15 Ohio St. 148, 151; Loomis v. Eagle B'k, 10 Id. 327; Casad v. Hughes, 27 Ind. 141; Lawrence v. Nelson, 21 N. Y. 158; Osgood v. De Groot, 36 Id. 348; Merritt v. Seaman, 6 Id. 168; Field v. Mayor etc., 6 Id. 179. And see Pomeroy on Remedies, etc., §§ 163–170.

title through them. The decisions involving the doctrine, in its application to these various circumstances, are directly conflicting. While a complete reconciliation of this conflict is impossible, there are considerations which will bring the authorities into a partial harmony. The rule which makes the right of a subsequent assignee subject to the equities subsisting in favor of the original or any prior assignor, is plainly a mere expression of the general principle, that among successive equitable interests in the same thing, the order of time prevails. The decisions which uphold the equities of the prior assignor, are either expressly or implicitly based upon this principle. But the principle itself is not absolute; it prevails only where the successive equitable interests are equal; indeed, the equity resulting *merely* from priority in time has been said to be the feeblest of any, and to be resorted to only when there is no other feature or incident of superiority.[1] Whatever creates a superior equity in one of the successive holders, will disturb the order of time, and many different features or incidents will have this effect. The *laches* of one having an interest prior in time may confer a superior equity upon a subsequent holder; *notice* may destroy a precedence otherwise existing; absence of a valuable consideration is always a badge of inferiority; and finally, the doctrine of estoppel may be properly invoked to prevent a prior party from asserting his right. In many of the cases which *appear* to deny the doctrine that a subsequent assignee takes subject to the equities of a prior assignor, or of a third person, the *decision* is, in fact, rested upon one or the other of these well-settled exceptions to the general principle of priority in order of time among successive equitable interests, although the opinion may not, perhaps, state such a ground as the *ratio decedendi*. It is possible, in this manner, to effect a partial reconcilement among the authorities; some conflict of opinion, however, still remains.

§ 708. **General Rule: Assignment Subject to Latent Equities.**—The equities of a prior assignor, or of a third person, have sometimes been called "latent." The theory that such "latent equities" can not prevail against the title of a second or other subsequent assignee, and that an assignee only takes subject to the equities in favor of the debtor party, has received some judicial support.[2] It is, however, unsound; it is, in

[1] See *supra*, vol. 1, § 414, and the opinion in Rice v. Rice, there quoted. This description of the right resulting from priority in time is, in my opinion, much too strong; it can hardly be reconciled with the imposing line of authorities cited in the following paragraphs.

[2] See cases, *infra*, under § 715.

effect, an extension of the peculiar qualities of negotiable instruments to things in action not negotiable. The doctrine is sustained by the weight of authority, I think, and by principle, that the right of the second or other subsequent assignee is subject to all equities subsisting in favor of the original or other prior assignor, unless in some settled mode recognized by equity jurisprudence such assignee has obtained a superiority which gives him the precedence. This doctrine must be regarded as correct, as based upon principle, as long as the distinction between negotiable and non-negotiable obligations is preserved in our jurisprudence.[1] I shall describe: (1) Those classes of cases in which the doctrine has been applied; and (2) Those in which it is not applicable.

§ 709. **Illustrations of this Rule.**—If the owner and holder of a thing in action not negotiable transfers it to an assignee upon condition, or subject to any reservations or claims in favor of the assignor, although the instrument of assignment be absolute on its face, this immediate assignee, holding a qualified and limited interest, can not convey a greater property than he himself holds; and if he assumes to convey it to a second assignee by a transfer absolute in form, and for a full consideration, and without any notice to such purchaser of a defect in the title, this second assignee takes it, nevertheless, subject to all the equities, claims, and rights of the original holder and first assignor.[2] In the second place, where the original assign-

[1] Bush v. Lathrop, 22 N. Y. 535; Anderson v. Nicholas, 28 Id. 600, approved by Woodruff, J., in Reeves v. Kimball, 40 Id. 209, 311; Mason v. Lord, 40 Id. 476, 487, *per* Daniels, J.; Schafer v. Reilly, 50 Id. 61, 67; McNeil v. Tenth Nat. B'k, 55 Barb. 59, 68; Williams v. Thorn, 11 Paige, 459; Mangles v. Dixon, 3 H. L. Cas. 702; Marvin v. Inglis, 39 How. Pr. 329; Bradley v. Root, 5 Paige, 632; Poillon v. Martin, 1 Sandf. Ch. 569; Maybin v. Kirby, 4 Rich. Eq. 105; Judson v. Corcoran, 17 How. (U. S.) 612. Some of these decisions deal with the broad doctrine, that the assignment is subject to equities in favor of all third persons. See also the numerous cases cited under the next following paragraph.

[2] Bush v. Lathrop, 22 N. Y. 535. This is altogether a leading and most instructive case, and squarely presents the question under discussion. The holder of a bond and mortgage for one thousand four hundred dollars, assigned and delivered them, by an instrument absolute on its face, to secure an indebtedness of two hundred and seventy dollars, the assignee giving back a written undertaking to return the same upon being paid the debt of two hundred and seventy dollars. This assignee afterwards transferred the securities to a second, and he to a third assignee, the latter paying full value, and having no notice of any outstanding claims or defects in the title. The original owner tendered to this assignee the two hundred and seventy dollars and interest, and demanded a return of the securities; and upon refusal, brought an action to compel such return. It was held that the action could be maintained. The opinion of the court, by Denio, J., is a most exhaustive discussion and able review of all the authorities which seem to sustain the doctrine that so called "latent equities" are not protected against an assignment. He shows that the ex-

ment is accomplished by a forgery of the holder's name, or where it is effected by a wrongful conversion of the security, together with a written instrument of transfer which has been signed by the owner, or where it is made upon an illegal consideration between the owner and his immediate assignee, or where it is procured by fraud, duress, or undue influence upon

pressions of judicial opinion to that effect are *obiter dicta*, while a large number of direct decisions are necessarily opposed to that view. I would add that the course of authoritative decisions in reference to the sale of chattels by conditional vendees who have been put in possession, and who have been held unable to transfer an absolute title to *bona fide* purchasers for value, fully supports the reasoning and conclusions of Judge Denio. There can be no possible ground of a valid distinction between the transfer of a thing in action when the transferror appears to be clothed with the complete ownership, but is actually not, and the transfer of a chattel by a person similarly situated and having all the outward *indicia* of perfect title. See Ballard v. Burgett, 40 N. Y. 314, and cases cited. Davis v. Bechstein, 69 Id. 440, 442, is a recent case, and important as explaining and limiting the effect of certain other decisions mentioned in a following paragraph. Plaintiff had executed a bond and mortgage to R., simply as an accommodation, and to be used as collateral security for a loan which R. expected to make. R. did not procure the loan, but assigned the securities, in form absolutely, to defendant, who was a purchaser for value and without notice. Plaintiff brings this action to have the bond and mortgage canceled. The court sustained the action upon the general doctrine of the text, that a purchaser of a thing in action not negotiable takes it subject to all equities subsisting in favor of an original owner or assignor, and the immediate assignor can give no better title than he has himself. The defendant claimed that the plaintiff was estopped, according to a rule supposed to have been laid down in two former decisions of the same court. In disposing of this claim, the court said, *per* Church, C. J. (p. 442): "Neither the decision in McNeil v. Tenth Nat. B'k, 46 N. Y. 325, nor in Moore v. Metrop. Nat. B'k, 55 Id. 41, affect the question involved in this case." [He quotes a passage from the opinion of Grover, J., in the last case, re-affirming the general doctrine, and adds:] "It is only where the owner, *by his own affirmative act, has conferred the apparent title and absolute ownership upon another*, upon the faith of which the chose in action has been purchased for value, that he is precluded from asserting his real title, and this conclusion was arrived at by the application of the doctrine of estoppel." See also Matthews v. Sheehan, 69 N. Y. 585 (action between the assignor and his immediate assignee). The following cases fully sustain the position of the text; and most of them are particularly important in their bearing upon the question suggested in some of the authorities, whether the original owner or assignor having the equities is not estopped from asserting them against the subsequent and innocent assignee: Reeves v. Kimball, 40 N. Y. 299, 304, *per* Lott, J., 311, *per* Woodruff, J.; Ingraham v. Disborough, 47 N. Y. 421; Schafer v. Reilly, 50 Id. 61, 67, 68, *per* Allen, J. (equities in favor of a third person); Ledwich v. McKim, 53 Id. 307; Cutts v. Guild, 57 Id. 229, 232, 233, *per* Dwight, J. (the doctrine pronounced to be "well settled," and applied to the assignment of a judgment); Barry v. Equit. Life Ins. Co., 59 Id. 587, 591; Trustees etc. v. Wheeler, 61 Id. 88, 104–106, 113, 114 (an elaborate discussion and review of authorities, carefully limiting the effect of decisions which have invoked the doctrine of estoppel, and applying the rule to equities subsisting in favor of *third persons*); Greene v. Warnick, 64 Id. 220, 224, 225 (restricting and limiting the doctrine of estoppel as suggested in Moore v. Metropolitan B'k, and sustaining the equities subsisting in favor of third persons); Marvin v. Inglis, 39 How. Pr. 329. In Sherwood v. Meadow Val. M. Co., 50 Cal. 412, an owner of a stock certificate, which he had indorsed in blank, lost it, and it fell into the hands of a *bona fide* purchaser for value, and *held* that the original owner's title

the owner, and in either of these cases the thing in action is afterwards transferred from the first to a second or other subsequent assignee, who takes it for value and without notice, the same rule must control; the equities of the original owner must prevail over the claims of the subsequent though innocent assignee.[1]

was superior to that of this purchaser. This decision agrees completely with the positions of the text; but in Winter v. Belmont M. Co., 53 Id. 428, 432, W., being owner of shares, caused them to be entered on the transfer books in the name of M., and a certificate thereof in due form to be issued to M., which certificate M. indorsed in blank and delivered to W. Afterwards, and while the same condition of facts existed, M. stole this certificate from W., and sold it in the market to a *bona fide* purchaser. *Held*, that the latter's title was good as against W. The court strongly intimated an opinion that the preceding case in 50 Cal. was incorrectly decided.

[1] Anderson v. Nicholas, 28 N. Y. 600. Certificates of stock, with a power of attorney indorsed upon them, and signed so that they were transferable in the market, were wrongfully converted from the owner, and were sold to the defendant, and it was held that the latter acquired no higher title than that held by his immediate transferror—the one who wrongfully converted the stock—and the original owner could recover the securities or their value. This case can not, perhaps, be regarded as a *direct* authority for the doctrine contained in the text; because there were certain facts which prevented the defendant from relying upon the position of a *bona fide* purchaser, and these circumstances *may* have influenced the decision. Three opinions were delivered. Davies, J., based his judgment entirely upon the ground that an assignee of a non-negotiable thing in action could under no circumstances acquire a better title than that possessed by his assignor, and he made no allusion to the defendant's want of good faith. Denio, J., dwelt upon the facts which showed bad faith; but was very careful to protest against any inference from his course of argument to the effect that, if the purchase had been in good faith, the assignee would have been protected. Hogeboom, J., seems to have adopted the view taken by Mr. Justice Davies. On the whole, although the *fact* of bad faith was an element in the case, it was not made the *ratio decidendi*, and the doctrine laid down applies to all transfers, those in good faith as well as those in bad faith. Other decisions are directly in point. Mason v. Lord, 40 N. Y. 476, 487, is a very strong case. The lessee of premises assigned the lease by an instrument rated on its face, but in fact as a security for an usurious loan made to him by the assignee. [The statute at that time declared all securities given upon usurious loans to be void, and liable to be canceled at the suit of the borrower, even without paying or tendering the money actually borrowed.] This lease was afterwards transferred by the assignee, passed through divers hands, and was finally purchased by the defendant, who paid full value and had no notice of any defect in the first transfer. Subsequent to the original assignment by the lessee, but before the transfer to the defendant, the plaintiffs recovered a judgment against such lessee, and the lessee's interest in the leased premises and in the lease itself, was sold on execution, bought in by the plaintiffs, and a sheriff's deed of such interest was delivered to them, which deed, however, was executed after the assignment to the defendant. The plaintiffs then commenced an action to recover possession of the leased premises, and to set aside the transfer of the lease to the defendants on account of the usury which affected and nullified the first assignment made by the lessee to his immediate assignee. The court, adopting to its full extent the doctrine as laid down in the text, held that the action could be sustained; that the lessee might have set aside the transfer from himself on account of the usury which tainted it; that the subsequent assignees, including the defendant, succeeded to all the rights, and were subject to all the liabilities possessed by and imposed upon the first assignee, and, finally, that the judgment creditors of

§ 710. **When the Rule does not Apply; Effect of Estoppel.**—I proceed next to consider the third case, where the original assignment is regular on its face, executed in the name of the original owner and by his signature voluntarily written, but the transfer is consummated through a breach of fiduciary duty by an agent or bailee contrary to the owner's intention, and this immediate assignee may afterwards transfer to an innocent holder. In relation to this particular condition of facts, a rule has been adopted by most able courts, and may be regarded, I think, as settled, which is entirely consistent with that stated in the preceding paragraphs. It is based upon the doctrine of estoppel. This special rule may be formulated as follows: The owner of certain kinds of things in action not technically negotiable, but which, in the course of business customs, have acquired a semi-negotiable character in fact, may assign or part with them for a special purpose, and at the same time may clothe the assignee or person to whom they have been delivered with such *apparent indicia* of title, and instruments of complete ownership over them, and power to dispose of them, as to *estop* himself from setting up against a second assignee, to whom the securities have been transferred without notice and for value, the fact that the title of the first assignee or holder was not perfect and absolute. The ordinary and most important application of this rule is confined to the customary mode of dealing with certificates of stock. If the owner of stock certificates assigns them as collateral security, or pledges them, or puts them into the hands of another for any purpose, and accompanies the delivery by a blank assignment and power of attorney to transfer the same in the usual form, signed by himself, and this assignee or pledgee wrongfully transfers them to an innocent purchaser for value in the regular course of busi-

the lessee were clothed with his rights and powers in the matter. Reid v. Sprague, 72 N. Y. 457, 462. A trustee, holding a bond and mortgage as part of the trust fund, sold and assigned it, in violation of the trust, to the defendant, who was a purchaser for value and without any notice. A suit on behalf of the *cestui que trust* to set aside the assignment and regain the securities, was sustained, the court holding that the defendant took them subject to all the claims of the *cestui que trust*. See, also, Davis v. Bechstein, 69 N. Y. 440 (*supra*, under § 709); Ingraham v. Disborough, 47 Id. 421 (failure of consideration); Schafer v. Reilly, 50 Id. 61, 67, 68; Ledwich v. McKim, 53 Id. 307; Cutts v. Guild, 57 Id. 229, 232, 233; Barry v. Equit. Life Ins. Co., 59 Id. 587, 591 (where an assignment of a non-negotiable thing in action—a life policy—is obtained from the owner by undue influence or coercion, and as then transferred to an innocent purchaser for value, this second assignee takes subject to all the rights of the original holder); Trustees etc. v. Wheeler, 61 Id. 88, 104–106, 113, 114; Greene v. Warnick, 64 Id. 220, 224, 225; Hall v. Erwin, 66 Id. 649; Crane v. Turner, 67 Id. 437, 440 (equities in favor of third persons).

ness, such original owner is *estopped* from asserting, as against this purchaser in good faith, his own higher title and the want of actual title and authority in his own immediate assignee or bailee.[1] This conclusion is in no respect necessarily antagonis-

[1] McNeil v. Tenth Nat. B'k, 46 N. Y. 325, reversing S. C., 55 Barb. 59. The supreme court held (1) that certificates of stock are in no respect negotiable, and (2) the rule as laid down by Denio, J., in Bush v. Lathrop. The law of estoppel was not alluded to. In the court of appeals the doctrine of latent equities was discussed; the decision of the court in Bush v. Lathrop, and the reasoning of Denio, J., were expressly recognized as correct, and as applicable to all cases in which the facts do not warrant the application of the principle of estoppel. Mr. Justice Rapallo, in his able judgment, does not discuss the rule in relation to things in action of all kinds; he confines himself exclusively to the particular species of security then before the court—certificates of shares in stock corporations; and while he does not claim for them absolute negotiability, he does in fact render them *indirectly* negotiable by means of the estoppel which arises upon dealing with them in the manner universally prevalent among business men. Speaking of Judge Denio's opinion, he says (p. 330): "But in no part of his learned and exhaustive opinion does he seek to apply its doctrine to shares in corporations or other personal property the *legal* title to which is capable of being transferred by assignment; and the free transmission from hand to hand is essential to the prosperity of a commercial people. The question of estoppel does not seem to have been considered in that case, and perhaps it would not have been appropriate." He expressly approves the rule frequently laid down as to chattels, and, while invoking the aid of estoppel, is very careful to state the narrow limits within which it may be used, and the kind of facts necessary to its use. He says (pp. 329, 330): "Simply intrusting the possession of a chattel to another as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property in case of an unauthorized disposition by the person so interested. (Ballard v. Burgett, 40 N. Y. 314.) The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give good title. But if the owner intrusts to another not merely the possession of the property, but also written evidence over his own signature of title thereto, *and of unconditional power of disposition over it*, the case is vastly different." The following seems to be the only rule sanctioned by the court in this important decision. If the owner of a thing in action, *of the particular species described*, delivers it to an assignee for a special purpose, with a simple written assignment, even absolute on its face, this of itself is not enough to raise the estoppel; but if, as a part of or accompanying this writing, the owner further gives "an unconditional power of disposition" over the security, then the estoppel may be involved. It remains to inquire whether other decisions have been confined to this narrow rule. In Holbrook v. N. J. Zinc Co., 57 N. Y. 616, 622, 623, the doctrine of estoppel was applied to the corporation itself whose stock had been transferred in good faith, and in the usual manner, to the plaintiff. In Combes v. Chandler, 33 Ohio St. 178, 181–185, the supreme court commission of Ohio applied the doctrine of McNeil v. Tenth Nat. B'k to the assignment of a non-negotiable promissory note—an instrument in the form of a promissory note, but payable to the payee named without any words of negotiability. The payee indorsed and delivered the note, but without any consideration and by the fraud of the immediate assignee; by this person it was transferred to a second assignee for value and without notice. The court held that the payee—the original owner—was estopped from asserting his title as against that of the second and innocent purchaser. This decision may be sustained on principle, by reason of the peculiar nature of the security itself. Although it is commonly said, in general terms, that the transferee of a promissory note *after maturity*, when it has become non-negotiable,

tic to the general doctrine concerning the assignment of things in action heretofore stated. The courts have simply recognized the growing and universal tendency of business men, in their customary modes of dealing, to treat stock certificates as though they were in all respects negotiable instruments; and they have felt themselves bound to give validity and effect to this general practice of merchants, as far as that could be done consistently with the established doctrines of the law. It is another instance of the manner in which mercantile customs have been adopted and incorporated into the law by the progressive course of judicial legislation. The decisions announcing the rule are based exclusively upon the form of the blank assignment and power of attorney executed by the assignor and delivered to the assignee, which clothed him with all the *apparent* rights of ownership that are recognized by business men in their usual course of dealing with like securities, as sufficient to confer a complete title and power of disposition upon the assignee. Should the doctrine thus invoked to protect the customary modes of transacting business with certificates of stock and similar *quasi* negotiable securities, be extended to all other things in action? Should the effect of an estoppel be produced from *a mere assignment of any security, absolute on its face, executed by the original owner, and delivered to his assignee?* There are cases which seem to have reached this result. The tendency of these decisions is towards the conclusion that whenever the owner of any non-negotiable thing in action delivers the same to another person with an assignment thereof absolute on its face,

takes it subject to all equities and defenses, yet this proposition is not true as to all kinds of equities even in favor of the maker. It is well settled that the assignment under such circumstances is subject only to the equities and defenses *inherent in the security itself transferred*, and not to those which are collateral or incidental. The same rule would probably embrace notes non-negotiable from the want of words of negotiability. See Story on Prom. Notes, § 178; Kyle v. Thompson, 11 Ohio St. 616; Hayward v. Stearns, 39 Cal. 58; *In re* Overend, Gurney & Co., L. R., 6 Eq. 344; *In re* European B'k, L. R., 5 Ch. 358; Sturtevant v. Ford, 4 Man. & Gr. 101; Oulds v. Harrison, 10 Exch. 572; Burrough v. Moss, 10 B. & C. 558; Holmes v. Kidd, 3 H. & N. 891. While the *decision* itself is thus undoubtedly correct, I do not think that some observations of the learned judge concerning the effect of estoppel upon assignors in general, can be sustained by McNeil v. Tenth Nat. B'k, as explained by the later cases in the same court cited in the two preceding notes. In several of those cases, as I have shown, it is expressly held that the rule of McNeil v. Tenth Nat. B'k, and Moore v. Metrop. B'k, does not apply to assignments of ordinary things in action, even when absolute on their face, when procured by fraud or coercion, or upon an illegal consideration or without any consideration. The following decisions are also supported by and illustrations of the text: Brewster v. Sime, 42 Cal. 139. 147; Thompson v. Toland, 48 Id. 99; Winter v. Belmont Min. Co., 53 Id, 428, 432; but see Sherwood v. Meadow Val. M. Co., 50 Id. 412.

and this person transfers it to a purchaser for value, who relies upon the apparent ownership created by the written assignment, and has no notice of anything limiting that title, the original owner is estopped from asserting against such purchaser any equities existing between himself and his immediate assignee, and any interest or property in the security which he may have notwithstanding the written transfer, even when those equities might arise from fraud, coercion, violation of a fiduciary duty, absence, or illegality of consideration, and the like.[1]

§ 711. **True Limits of Estoppel as Applied to Assignments of Things in Action.**—While the particular application of the doctrine of estoppel to the usual dealings with shares of stock, as made in McNeil v. Tenth National Bank and kindred cases, is clearly a step in the interests of commerce, since

[1] Moore v. Metropolitan B'k, 55 N. Y. 41, 46–49. Moore, the owner of a certificate of indebtedness for $10,000, delivered it to one Miller for a certain special purpose, but not intending to transfer any property therein; in fact, M. was to procure it to be discounted, and to hand over the proceeds, or else to return the certificate. Moore, however, gave M. the following writing, indorsed on the instrument: "For value received, I hereby transfer, assign, and set over to Isaac Miller the within-described amount, say $10,000. Levi Moore." Miller assigned the certificate to the defendant for value, who took it on the faith of this written assignment without notice of the true relations between Moore and Miller. The action was brought to recover possession of the certificate. The court said, *per* Grover, J. (pp. 46–49), that it did not intend to abandon the *general* doctrine concerning assignments being subject to equities as declared in Bush v. Lathrop, and other authorities, but held that this case was controlled by McNeil v. Tenth Nat. B'k, and that the judgment in the latter case was inconsistent with the reasoning of Denio, J., in Bush v. Lathrop, and with the decision made on the facts of that case. Grover, J., does not allude to the careful distinction drawn by Rapallo, J., between the circumstances of the two cases, nor his approval of the general doctrine and course of reasoning contained in Judge Denio's masterly opinion. Nor does Judge Grover make the slightest allusion to the narrow limits placed by Rapallo, J., upon the use of the estoppel; namely, to those cases in which the assignor, by a written instrument over his signature, confers not only the apparent title, but *the unconditional power of disposition* over the security. While the judgment of Rapallo, J., in McNeil v. Tenth Nat. B'k, was guarded and cautious, and eminently proper in respect to the peculiar class of securities, that of Grover, J., is, I think, unsupported by authority, and unsound in principle. In comparing and weighing such conflicting decisions, it is proper for me to express the opinion that the authority of Judge Denio, for ability, learning, and experience, is immeasurably superior to that of Judge Grover, and is not, perhaps, surpassed by that of any of his cotemporaries among the American judiciary. In fact, the special force of the decision in Moore v. Metropolitan B'k has been completely destroyed, and it has been strictly confined to the doctrine laid down in McNeil v. Tenth Nat. B'k, by the more recent cases in the same court heretofore cited. While these cases have not *expressly* overruled Moore v. Metrop. B'k, it is plain that they are wholly inconsistent with it; if its reasoning and result were correct, most of these cases would of necessity have been differently decided. See Trustees etc. v. Wheeler, Greene v. Warnick, and other cases quoted *supra* in n. 2, under § 709. In Farmers' Nat. B'k v. Fletcher, 44 Iowa, 252, this same doctrine of estoppel was applied to the assignor of a mortgage, as against an assignee for value and without notice.

it recognizes and validates mercantile customs which had become universal throughout this country, the extension of the same rule to all things in action, as described in the preceding paragraph, plainly tends to undermine, shake, and finally abrogate the well-settled doctrine which renders the assignments of non-negotiable things in action subject to the equities subsisting in favor of the debtor parties, as well as those outstanding in favor of third persons; or, at all events, it tends to confine the operation of that doctrine to cases in which the assignment is so drawn that it is, on its face, constructive notice to all subsequent assignees deriving title through it. In the class of decisions alluded to—Moore v. Metropolitan Bank, and like cases—the estoppel is made to arise from a mere naked transfer in writing, absolute in form; the *ratio decidendi* is the apparent ownership thus conferred upon the assignee; and these elements of the rule will apply to so many cases that things in action are practically rendered negotiable as between the series of successive holders—the assignors and assignees. This point being reached, it will be an easy and almost necessary step to extend the estoppel to the debtor party himself—the obligor or promisor who utters the security. If negotiability is produced by means of an estoppel between the assignor and assignee, arising from the fact and form of a transfer from one to another, by parity of reasoning the debtor may be regarded as estopped by the fact and form *of his issuing the undertaking and delivering it to the first holder*, and thus creating an apparent liability against himself. In short, there seems to be exactly the same reason for holding the debtor estopped from denying his liability upon a written instrument which apparently creates an absolute liability, when that instrument has passed into the hands of a purchaser who had no notice of the actual relations between the original parties, as for holding an assignor estopped from denying the completeness of a transfer made by him simply because it is absolute on its face. This result, if reached, would make all things in action practically negotiable. According to the law merchant "negotiability" consisted of two elements: *First*, the fact that the transferee obtained the legal title and could sue at law in his own name; and, *second*, the fact that the transferee in good faith and for value, took free from all equities and nearly all defenses subsisting in favor of prior parties to the paper. The first of these elements now belongs, in the great majority of the states, to all things in action. There is, as it seems to me, an evident *tendency*, on the part of

the courts in many states, to enlarge the scope of the second element, and to extend it also to all species of things in action which are embodied in contracts or instruments in writing.

§ 712. **Subsequent Assignee Obtaining the Legal Title may be Protected as a Bona Fide Purchaser.**—In the discussions of the foregoing paragraphs,[1] it has been constantly assumed that the assignee had acquired only an equitable title, in order that he might take subject to the equities subsisting in favor of a prior assignee or of a third person. If in addition to his equitable interest conferred by the assignment, he has also obtained the *legal* title, or even if his situation is such that he has the best right to call for the legal title, then the doctrine of purchase for a valuable consideration and without notice may apply so as to protect him against all such outstanding equities. It should be constantly borne in mind that priority of time gives precedence of right among successive and conflicting equitable interests, only when these equitable interests are *equal* in their nature or incidents. An illustration may be seen in the decisions of many able courts with respect to dealings in shares of stock. Where a transfer of a certificate has been made by the owner's own signature, but procured only through the fraud, breach of duty, or conversion of the person who actually effects the first assignment, or without consideration or upon an illegal consideration, and even where the transfer is accomplished solely by a forgery of the owner's name to the indorsement and power of attorney, and the certificate thus comes into the hands of a purchaser for a valuable consideration and without notice, and he perfects his legal title by surrendering the original certificate to the corporation and receiving a new one in his own name, and by procuring the transaction to be properly entered upon the company's transfer books, which thereupon show him to be the legal owner of the shares, the assignee under these circumstances, as is held in many cases, obtains a complete precedence over the original owner; he is not liable to the owner for the shares nor for their value; the owner's remedy, if any exists at all, is against the corporation alone, to compel it either to issue new shares or to pay the value of the old ones.[2]

[1] Viz., from §§ 707 to 711.

[2] This conclusion has been reached in cases of *forgery*, and it would *a fortiori* seem to follow in cases of fraud, conversion, want of consideration, etc.; in the latter cases, however, the corporation *might* not be liable. Pratt v. Taunton Copper M. Co., 123 Mass. 110, 112. Plaintiff's certificate of shares with a forged power of attorney, was delivered, without his knowledge or assent, to an auctioneer for sale; this certificate was surrendered to the corporation and it issued a new one in the name of the auctioneer, who sold and delivered it to

These decisions should, on principle, apply to and protect the assignee of every other species of thing in action who has acquired the legal title.

§ 713. **Successive Assignments by Same Assignor to Different Assignees.**—The remaining case to be considered under this head, as mentioned in a former paragraph,[1] is that of successive transfers of the same thing in action made by the same person—the creditor party—to different assignees. The American decisions upon this particular case can not be reconciled. I can only present those settled doctrines of equity which, it would seem, should apply to and govern such a condition of circumstances. In England and in several of the states the rule giving to the assignee who first notifies the debtor party or trustee, a precedence over all others, even those who are earlier in date, furnishes a certain and simple criterion for determining the priority, it being remembered that this rule is confined to pure personal things in action, and does not extend to liens and other equitable interests in real estate.[2] In the states where the rule referred to does not prevail, the question must turn upon other doctrines. If the interests are equitable in their nature, and the equity of no assignee is intrinsi-

a *bona fide* purchaser for value and without notice, and this assignee in turn surrendered the second certificate and received a third one issued to himself. The owner brought a suit in equity against the corporation and the purchaser. The court held, (1) That the plaintiff could maintain a suit against the corporation to compel it to issue a certificate of a like number of shares to him, and to pay him all the dividends thereon; citing: Ashby v. Blackwell, 2 Eden, 299; Ambl. 503; Sloman v. Bank of Eng., 14 Sim. 475; Midland R'y v. Taylor, 8 H. L. Cas. 751; Pollock v. Nat. B'k, 7 N. Y. 274. But (2) the plaintiff was entitled to no relief against the purchaser, who was a purchaser in good faith for a valuable consideration and without notice, and who *did not hold the certificate of shares which the plaintiff had;* citing Bank v. Lanier, 11 Wall. 369; *In re* Bahia etc. R'y, L. R., 3 Q. B. 584, and the Massachusetts cases hereafter named in this note. (3) If the purchaser claimed under a transfer which he knew or was bound to know to be forged or invalid, a different case would be presented, citing Cottam v. Eastern Co. R'y, 1 Johns. & Hem. 243; Johnston v. Renton, L. R., 9 Eq. 181; Tayler v. Great Ind. Pen. R'y, 4 De G. & J. 559; Denny v. Lyon, 38 Pa. St. 98. See also, to the same effect, Sewall v. Boston Water P. Co., 4 Allen, 277; Loring v. Salisbury Mills, 125 Mass. 138; Pratt v. Boston & A. R. R., 126 Id. 443; Machinists' Nat. B'k v. Field, Id. 345. (This case holds that the bank, after having obeyed the decree under the circumstances stated in 123 Mass. *supra*, can not maintain any suit for reimbursement against the purchaser.) Telegraph Co. v. Davenport, 7 Otto (97 U. S.) 369 (holds the corporation liable, but rather implies than expressly declares the purchaser not to be liable). The following California decisions involve, if they do not expressly declare, the same rule: Brewster v. Sime, 42 Cal. 139, 147; Thompson v. Toland, 48 Id. 99; Winter v. Belmont Min. Co., 53 Id. 428, 432 (but see Sherwood v. Meadow Valley M. Co., 50 Id. 412); People v. Elmore, 35 Id. 653; Weston v. Bear Riv. etc. Co., 5 Id. 186; 6 Id. 425; Naglee v. Pac. Wharf Co., 20 Id. 529, 533.

[1] See § 707.

[2] See *supra*, §§ 695–697.

cally superior to the others, the settled principle of equity should control, that the order of time determines the order of priority; or, in other words, that the subsequent assignee takes subject to the rights of the one prior in time; and this principle has been applied, in such cases, by many able decisions.[1] On the other hand, if the subsequent assignee has acquired the legal title, and was a purchaser in good faith for a valuable consideration and without notice, he is protected; and this doctrine of *bona fide* purchase seems to have been extended, by some decisions, to subsequent assignees who had only obtained an equitable interest.[2]

§ 714. **3. Equities in Favor of Third Persons.**—Equities in favor of third persons through whom the title to the thing in action has never passed, and those in favor of a former assignor, are intimately connected; indeed, they are only different phases of the same doctrine, and must stand or fall together. If the imperfection of an assignee's title is not confined to equities subsisting in favor of the debtor party, there is no reason in the nature of things why it should not extend to the equities of all other parties—third persons as well as previous holders and assignors; in fact, the doctrine would apply with fewer exceptions in the case of third persons than in the case of prior assignors. As a third person, although having some interest or claim which constitutes his "equity," has never been an owner or holder of the chose in action, and has never transferred it, his conduct towards it can not, in general, enable the assignee to invoke against him the doctrine of estoppel. These conclusions are fully sustained by judicial authority. Wherever the narrower view that an assignee takes subject *only* to the equities of the debtor has been rejected, and the theory of "latent" equities has been disregarded, the courts have described the assignment as subject to *all* claims existing against the assignor, have laid down the rule in comprehensive and positive terms, that the assignee takes subject to *all* equities, latent or open, of third persons. Of course, the "equity," in such a case, must be some subsisting claim to or against the thing in action itself, or the fund which it represents, which the third person held

[1] Taylor v. Bates, 5 Cow. 376; Muir v. Schenck, 3 Hill, 228; Pratt's Appeal, 77 Pa. St. (27 P. F. Sm.) 378, 381; Coon v. Reed, 79 Pa. St. 240; Lindsay v. Wilson, 2 Dev. & Bat. Eq. 85; Allen v. Smitherman, 6 Ired. Eq. 341; Wallston v. Braswell, 1 Jones Eq. 137; Lowner v. The Bank, 39 Vt. 25, 32.

[2] See Judson v. Corcoran, 17 How. 612, and other decisions, where a subsequent assignee without notice has been protected by obtaining a legal title or advantage, or by his diligence or the laches, etc., of the prior assignee, *supra*, § 698, and notes.

and could have enforced if it had remained in the hands of the assignor; as, for example, a lien or charge upon the fund or some part of it, or upon the security, or an equitable ownership or right to the fund or security, and the like.[1] The case of subsequent execution or attachment creditors of the assignor stands upon a somewhat different footing, since their equities *in* the subject-matter are not existing at the time of the assignment.

§ 715. **Contrary Rule, that Assignments of Things in Action are Free from Latent Equities in Favor of Third Persons or Previous Assignors.**—On the other hand, the conclusions reached by this imposing line of authorities have been wholly rejected. Able judges and courts have maintained the position that assignments of things in action are subject only to equities of *the debtor* party; that they are never subject to equities in favor of third persons, and especially that they are free from that kind of prior claim often called "latent equities."[2] Although this direct conflict can not be completely

[1] Davies v. Austen, 1 Ves. 247, *per* Lord Thurlow; Mangles v. Dixon, 3 H. L. Cas. 702, 731; Bebee v. Bank of N. Y., 1 Johns. 529, 552, *per* Spencer, J., p. 549, per Tomkins, J. (in these cases the rule is laid down in the most general form); Shropshire etc. R'y v. The Queen, L. R., 7 H. L. 496 (A., for value and without notice, obtained an equitable interest by assignment in certain shares of stock from B. *who had the legal title*. A.'s interest was held subject to the rights of a *cestui que trust*, C., for whom B. really held the shares as trustee; see the cases cited in the opinions); Bush v. Lathrop, 22 N. Y. 535, *per* Denio, J. (a most able review of the preceding authorities); Schafer v. Reilly, 50 N. Y. 61, 67, 68, *per* Allen, J.; Trustees etc. v. Wheeler, 61 Id. 88, 104–106, 113, 114, *per* Dwight, J.; Greene v. Warnick, 64 Id. 220, 224, 225 (the rule fully discussed and applied to equities of third persons); Van Rensselaer v. Stafford, Hopk. Ch. 569, 575, affirmed; 9 Cow. 316, 318 (Van D. bought lands from Van R. on credit; sold part to W., from whom he took two mortgages of the same date for the price, intending to assign one of them to Van R. as security for the debt due him. Both mortgages were recorded at the same time; he first assigned one of them to Van R. and afterwards assigned the other to S. S., who was a *bona fide* purchaser for value, etc. *Held*, that the mortgage assigned to Van R. obtained a priority, and S. S. took the one assigned to him subject to all the equities which Van R. had against the assignor Van D. and in or upon the land); Taylor v. Bates, 5 Cow. 376 (A., a *bona fide* assignee of an entire pecuniary demand held subject to the rights of B., who, by a previous arrangement with the creditor-assignor, was entitled to a portion of the proceeds); Muir v. Schenck, 3 Hill, 228 (disapproving of *dicta* of Chancellor Kent in Murray v. Lylburn, 2 Johns. Ch. 441, 443); Brooks v. Record, 47 Ill. 30 (assignee of a negotiable note and chattel mortgage after maturity, held subject to the rights of one who had purchased the chattels for value and without notice after the mortgage was given; the *mortgagee* had estopped himself by his conduct from enforcing the mortgage against such purchaser, and the assignee was affected by the same equity); Allen v. Watt, 79 Ill. 284 (assignee of a judgment held subject to a lien acquired by creditors previous to the assignment); Pindall v. Trevor, 30 Ark. 249; Trabue v. Bankhead, 2 Tenn. Ch. 412; Parrish v. Brooks, 4 Brews. (Pa.) 154; Bradley v. Root, 5 Paige, 632; Poillon v. Martin, 1 Sandf. Ch. 569; Maybin v. Kirby, 4 Rich. Eq. 105; Judson v. Corcoran, 17 How. (U. S.) 612.

[2] Livingston v. Dean, 2 Johns. Ch. 479; Murray v. Lylburn, 2 Id. 441, 443 (the opinion of Chan. Kent in

reconciled, yet the apparent discrepancy which exists among similar cases may be explained and at least partly removed by certain well-settled principles of equity which are recognized by all courts. The equity of the second assignee may, from some intrinsic element or some external incident, be "superior," and may therefore be entitled to a precedence; or the second assignee may have obtained a legal title, so that the doctrine of *bona fide* purchaser for a valuable consideration will apply and give him protection; or the holder of the prior equity may have been guilty of laches or other conduct making it inequitable to subject an innocent subsequent assignee to his claim.[1]

§ 716. **Equitable Estates, Mortgages, Liens, and Other Interests.**—Having thus considered the general principles concerning priority in their effect upon assignments of pure things in action, I shall now examine their application to another group of equitable interests in property, including estates, liens, charges, and the like. The general doctrines which control these kinds of interests, and determine their order of priority, have been presented in the former part of this section, and require no further discussion; it only remains to illlustrate their application under various circumstances to different conditions of fact. It will be remembered that among equitable interests only in the same subject-matter, otherwise equal, the order of time controls; that between two or more equities, one may be intrinsically superior in its nature, and thus entitled to the precedence; that between an equitable title and a legal title in the same thing, the latter generally prevails; and finally the priority resulting from order of time merely, or that resulting from the superior nature of the equity itself, or that belonging to a legal title, may be postponed or defeated, in various manners, and by various incidents, among which the most important are, notice given to, or fraud or negligence of, the holder of the interest which would otherwise have been preferred.[2]

these cases seems to be the authority on which all the later similar decisions are rested. His opinion on this point has been repeatedly overruled by the New York courts; see Muir v. Schenck, 3 Hill, 228, and Bush v. Lathrop, *supra*); Bebee v. B'k of N. Y., 1 Johns. 529, 573, *per* Kent, C. J.; James v. Morey, 2 Cow. 246, 298, *per* Sutherland, J.; Losey v. Simpson, 3 Stockt. Ch. 246; Bloomer v. Henderson, 8 Mich. 395, 402; Croft v. Bunster, 9 Wisc. 503, 508; Mott v. Clark, 9 Pa. St. (9 Barr.) 399, 404; Taylor v. Gitt, 10 Id. 428; Metzgar v. Metzgar, 1 Rawle, 227; McConnell v. Wenrich, 4 Harris, 365; Moore v. Holcombe, 3 Leigh, 597; Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25, 39. An assignee for value and without notice of a chattel mortgage, fraudulent as against the creditors of the mortgagor, obtains a good title superior to the equities of such creditors. Sleeper v. Chapman, 121 Mass. 404; see also, upon the general question discussed in the text, Sumner v. Waugh, 56 Ill. 531.

[1] See *supra*, § 698, quotation from Judson v. Corcoran, 17 How. (U. S.) 612, and other cases cited.

[2] See *supra*, §§ 683–692.

§ 717. **Doctrine of Priorities Greatly Modified by the Recording Acts.**—These doctrines, forming a most important part of the equity jurisprudence, have been well settled, applied to every kind of equitable estate, lien, and interest, and illustrated by innumerable examples. The scope and operation of these purely equitable doctrines throughout the United States have been greatly broken in upon and modified by the various recording acts; so that any uniformity of the practical rules has been made virtually impossible. The provisions of the recording acts differ exceedingly in the different commonwealths, as has been shown in the preceding section.[1] In some states, only "conveyances," including deeds and mortgages, are to be recorded; in others, every kind of instrument creating or assigning any interest in or lien or charge upon land, and even instruments dealing only with personal property, may be recorded. A similar diversity exists in the statutory provisions regulating the effect of docketed judgments. Another cause which has disturbed the uniformity of rules upon this general subject, is found in the various theories which prevail concerning the nature and effect of mortgages of land; theories which are not only unlike the common law and equitable system originally settled in England, but which greatly differ among themselves. To discuss in an exhaustive manner the subject of priorities *as modified* by the statutory legislation, and to present all the rules growing out of their local recording acts, as settled in the various states, would plainly transcend the limits of this work, and would, in fact, require a volume by itself; for such an extended and minute treatment the reader must be referred to treatises upon mortgages and conveyancing, and to the decisions in each state which have given a construction to its own statutes. I shall endeavor simply to illustrate the well-settled doctrines of equity, independent of statutory rules, and then to describe some effects of the registration system, with the modifications, somewhat different in different commonwealths, which it has introduced.

§ 718. **I. Priority of Time among Equal Equities.**—The general doctrine is well settled, as already stated,[2] that among successive equitable estates, liens, and interests which are equal—that is, where neither claimant holds the legal estate or has the best right to call for it, and neither is intrinsically superior to the others, nor is affected with any collateral incident, such as negligence or fraud—the order of time controls, even

[1] See *supra*, § 646.

[2] See *supra*, §§ 678, 682.

though a subsequent holder acquired his interest without any notice of the prior one. Under these circumstances the maxim, *qui prior est tempore, potior est jure*, applies. The doctrine has been fully recognized and constantly enforced by American courts, wherever its operation has not been interfered with or modified by the recording acts.[1] The equities to which this rule has been most frequently applied by the English courts are equitable mortgages, especially those created by a deposit of title-deeds, a kind of security almost unknown in this country. In order to accurately appreciate the decisions upon this subject, it is important to keep in mind the peculiar rules concerning the nature of legal and equitable mortgages, which prevail in the English law; and which are in many respects different from our own system.[2]

§ 719. **Illustrations: Simultaneous Mortgages; Substituted Liens, etc.**—It has naturally followed, from the provisions of the recording acts, and from the quite different modes of conducting business prevailing in this country, that the

[1] Phillips v. Phillips, 4 De G. F. & J. 208, 215, 218; Cave v. Cave, L. R., 15 Ch. D. 639, 646 (interest of a *cestui que trust* and an equitable mortgage); Rice v. Rice, 2 Drew. 73 (vendor's lien and equitable mortgage); Bradley v. Riches, L. R., 9 Ch. D. 189 (two equitable mortgages); Dixon v. Muckleston, L. R., 8 Ch. 155; Newton v. Newton, L. R., 4 Ch. 143; 6 Eq. 135, 140; Waldy v. Gray, L. R., 20 Eq. 238; Thorpe v. Holdsworth, L. R., 7 Id. 139; Cory v. Eyre, 1 De G. J. & S. 149, 163; Roberts v. Croft, 2 De G. & J. 1; Beckett v. Cordley, 1 Bro. Ch. 353, 358; Mackreth v. Symmons, 15 Ves. 329, 354; Wilmot v. Pike, 5 Hare, 14; Potter v. Sanders, 6 Id. 1; Ford v. White, 16 Beav. 120; Berry v. Mut. Ins. Co., 2 Johns. Ch. 603; Cherry v. Monro, 2 Barb. Ch. 618; Grosvenor v. Allen, 9 Paige, 74, 76; Thorpe v. Durbon, 45 Iowa, 192; Hoadley v. Hadley, 48 Ind. 452; Stevens v. Watson, 4 Abb. App. Dec. 302; Littlefield v. Nichols, 42 Cal. 372; Walker v. Matthews, 58 Ill. 196.

[2] With respect to priorities between successive *equitable* mortgages, see Bradley v. Riches, L. R., 9 Ch. D. 189; Dixon v. Muckleston, L. R., 8 Ch. 155; Waldy v. Gray, L. R., 20 Eq. 238; Thorpe v. Holdsworth, 7 Id. 139, and other cases cited in last note. With respect to such priority where there has been negligence on the part of the one first in order of time, see Layard v. Maud, L. R., 4 Eq. 397, 406; Hunter v. Walters, Id., 11 Eq. 292; Pease v. Jackson, Id., 3 Ch. 576. If the legal owner of land gives a first mortgage on it to A. in the ordinary form known to the common law, of a deed with a condition, this is of course a legal mortgage; A. obtains and holds the *legal* title and estate, if the mortgage is of the fee, then his estate is the legal fee. While this first mortgage is outstanding, all subsequent mortgages of the same land to B., C., D., etc., no matter what may be their forms, are necessarily *equitable* mortgages; even if such a subsequent mortgage be in the form of a legal conveyance, it can only convey an equitable estate, since the legal estate has already been conveyed away and is vested in the first mortgagee A. This is the settled rule necessarily resulting from the English theory of mortgages. Again, if the legal owner of land creates a first mortgage upon it by depositing all his title-deeds with A., A.'s interest is certainly an equitable mortgage; but since he is first in order of time, and possesses all the legal muniments of title, and has the right to call for the execution of an ordinary legal mortgage by conveyance in order to perfect his security, his position is plainly similar to that of a legal mortgagee.

questions presented to the American courts for decision have been of another character, arising from other circumstances. Among these questions, one relates to simultaneous mortgages or other liens.[1] Two or more mortgages having been given at the same time, or as parts of the same single transaction, with the intention that they should be simultaneous liens, they may perhaps be recorded on different days, and the court may be called upon to settle the equities between the mortgagees or their assignees. A second and most important question concerns

[1] Morse v. Brockett, 67 Barb. 234. A first mortgage being given to A. and a second to B., both on the same land, and as a part of one and the same arrangement, no money passing between the parties at the time, B. may insist that, as against his own mortgage, A.'s mortgage has no force except to the extent that A. has performed the agreement under which they were given. The consideration of A.'s mortgage was his undertaking to satisfy the mortgagor's liabilities to the amount of twenty thousand dollars. *Held*, that he could only enforce to the extent he had performed his agreement. Also, by his agreement, he became, as between himself and the mortgagor, with respect to these liabilities, the principal debtor; and when he had satisfied judgments against the mortgagor, he could not hold them as assignee, and enforce them against the mortgagor. Van Aken v. Gleason, 34 Mich. 477. Where two mortgages are of even date, and intended to be simultaneous, but recorded on different days, the foreclosure of one of them by advertisement would not settle the equities of the purchaser at the sale and of the person holding the other; a suit in equity would be necessary to determine their respective rights. The fact that the one recorded on the later day bore an acknowledgment of an earlier date, does not show that it was intended to be the prior security. Gausen v. Tomlinson, 23 N. J. Eq. (8 C. E. Green), 405. Where two mortgages on the same land are given at the same time to the same person, an earlier record of one will not give it any precedence over the other, even when between assignees. Such mortgages, in the hands of different assignees, are concurrent liens, payable ratably, if necessary. Gausen v. Tomlinson, *supra;* Howard v. Chase, 104 Mass. 249. Where two simultaneous mortgages are given with an agreement that they are to be equal liens, the earlier record of one gives no priority over the other, even to an assignee of the one first recorded. Such assignee is charged with notice by the record of the other mortgage. If both the mortgages, or either of them, contain a stipulation that they are to be simultaneous, or a statement that both were given for purchase money, then the first record of one will give it no priority either in the hands of the mortgagee or of an assignee. Greene v. Warnick, 64 N. Y. 220. On the other hand, if simultaneous mortgages are given to different persons, as parts of the same transaction, each having notice of the other, their priorities *as between the mortgagees* will depend upon the equities intrinsically belonging to them, without reference to the order of recording. Rhodes v. Canfield, 8 Paige, 545; Jones v. Phelps, 2 Barb. Ch. 440; Pomeroy v. Latting, 15 Gray, 435; Sparks v. State B'k, 7 Blackf. 469. If, however, one of these mortgages is assigned to a *bona fide* purchaser for value and without notice, he may by obtaining the earliest record secure the priority over the other which has intrinsically a superior equity. Corning v. Murray, 3 Barb. 652. If a grantee of land, as a part of his purchase, and the whole constituting one transaction, gives a mortgage back to his grantor for purchase money, and also a mortgage to another person, and the deed and two mortgages are recorded at the same time, the purchase-money mortgage to the grantor is entitled to the priority. Clark v. Brown, 3 Allen, 509; and see Dusenbury v. Hulbert, 2 T. & C. 177. This subject is more fully discussed in 1 Jones on Mort., §§ 566–568, from which a portion of this note has been borrowed.

the respective claims of precedence between a prior unrecorded mortgage or other specified equitable lien, and a subsequent docketed judgment.[1] Another question relates to the effect of substituting a different lien in the place of one already existing, whether the substituted lien retains the precedence which belonged to the one which it has replaced.[2] Very many cases have arisen, involving special facts, and depending for their decision upon their particular circumstances. Some of them have been placed as illustrations in the foot-note.[3]

§ 720. **II. One Equity Intrinsically the Superior. Prior General and Subsequent Specific Lien.**—The doctrine has already been stated,[4] that where one of two equities is intrinsically the superior, it is entitled to precedence;[5] and that an

[1] This particular question, which has given rise to a direct conflict of opinion, is more fully examined under the next head (*infra*, §§ 721–724), and I simply here cite some of the cases involving it. Galway v. Malchow, 7 Neb. 285; King v. Portis, 77 N. C. 25; Corpman v. Baccastow, 84 Pa. St. 363; Van Thorniley v. Peters, 26 Ohio St. 471; Stevens v. Watson, 4 Abb. App. Dec. 302; Merriman v. Polk, 5 Heisk. 717; Fain v. Inman, 6 Id. 5; Wheeler v. Kirtland, 24 N. J. Eq. (9 C. E. Green), 552; Knell v. Build. Ass'n, 34 Md. 67.

[2] It will be found, I think, from the decisions, that no general rule can be formulated which shall be an answer to this question. The effect of the substitution, in retaining the original priority, must depend, it would seem, both upon the intent of the parties, and upon the mode in which it was consummated. Each case must, therefore, to a certain extent, turn upon its own special circumstances. In Thorpe v. Durbon, 45 Iowa, 192, it is said that in exchanging one form of security for another, for the same debt, no other lien can intervene and obtain a precedence. A vendor in a land contract retained his lien on the land for the unpaid price, which was prior to a mechanic's lien which had subsequently arisen and attached for the building of a house by the vendee. Afterwards the vendor gave a deed of conveyance and took back a mortgage to secure the purchase price. The lien of this mortgage, it was held, being substituted for the vendor's lien, retained the precedence which had belonged to the latter, and prevailed over the mechanics' lien, although actually later in date. Eggeman v. Eggeman, 37 Mich. 436. The parties to a mortgage agreed that a new one should be substituted. On the same day that this substituted security was completed, but executed and recorded before it, another mortgage was secretly given to the mortgagor's father-in-law, for money which he had previously advanced to mortgagor's wife. It was made with the design of giving him priority, but without his participation: *Held*, that this mortgage must be postponed to that of the plaintiff, since, on the assumption that it was not fraudulent, the mortgagee had no equities which could make it anything but a second mortgage against the plaintiff's substituted security. In Kitchell v. Mudgett, 37 Mich. 81, there were three successive mortgages, and K. paid off *and discharged* the first and second, and then took a new mortgage for the amount which he had thus paid: *Held*, that this one was subject to the mortgage No. 3, and K. could not keep alive the lien of the first two, so as to give his mortgage the priority.

[3] Deere v. Young, 39 Iowa, 588; Hemminway v. Davis, 24 Ohio St. 150; Dusenbury v. Hulbert, 2 T. & C. 177; Lowry v. McKinney, 68 Pa. St. (18 P. F. Sm.) 294; Armstrong v. Ross, 20 N. J. Eq. (5 C. E. Green), 109.

[4] See *supra*, §§ 684–692.

[5] As an illustration, in Rice v. Rice, 2 Drew. 73, a vendor conveyed, without receiving the purchase price, but indorsing the receipt of it upon the deed, and delivering the title-deeds to the grantee. This grantee then made an equitable mortgage by a deposit of

equitable interest *in rem*, such as that created by a mortgage, contract, trust, and the like, is superior to a mere voluntary interest, and to the general lien of a judgment. It would seem to be a general rule, at all events a correct deduction from settled principles, that where there is a prior general lien, embracing among other things a certain subject-matter, and a specific lien is subsequently created upon that same particular subject-matter, not voluntary but arising from a new and valuable consideration, such subsequent specific lien would be intrinsically superior, and therefore entitled to the precedence, at least if it were acquired by the holder thereof without notice of the prior general incumbrance. This rule is certainly recognized by some decisions.[1]

§ 721. **Prior Unrecorded Mortgage Superior to Subsequent Docketed Judgment.**—The most important question under this head which has come before the American courts relates to the respective claims arising from a prior specific and a subsequent general lien. The doctrine is certainly established as part of the equity jurisprudence, and rests upon the solid basis of principle, that prior equitable interests *in rem*, includ-

the title-deeds, and absconded. *Held*, that the vendor's lien for the unpaid price, although prior in time, must be postponed to the equitable mortgage, because the possession of the title-deeds and *the fact of the indorsement of the receipt on the deed* made the mortgagee's equity superior. See, also, Newton v. McLean, 41 Barb. 285.

[1] *In re* Hamilton's etc. Ironworks, L. R., 12 Ch. D. 707, 710, 711. A company gave a mortgage of all its land, fixtures, stock in trade, and its undertaking, to secure its bondholders and other creditors. The company afterwards borrowed a sum of money to use in carrying on its business from A., who knew of the previous mortgage, and gave him as security a charge by way of assignment on a certain sum of money about to become due to the company for the completion of certain work. The work being completed and the money due, it was held that A.'s claim to it was entitled to preference over that of the mortgagees. The same rule seems to be sustained by the following cases. In Stevens v. Watson, 4 Abb. App. Dec. 302, it is held that while a mortgage by a railroad company of all its property then existing or afterwards to be acquired, creates a valid equitable lien upon all the after acquired property, which is superior to that of an ordinary subsequent judgment, still if such subsequent judgment is confessed to secure the payment of money advanced at the time on the faith of it by the judgment creditor, the latter lien thereby becomes entitled to a precedence over the prior incumbrance by the mortgage, citing to the same effect, Hulett v. Whipple, 58 Barb. 224. In Fain v. Inman, 6 Heisk. 5, it is held that where the vendor conveys the legal title without retaining a lien for the purchase money in any express manner, his right to enforce payment against the land in the hands of the vendee is a mere "equity," and must be postponed to a specific lien subsequently acquired either with or without notice by a creditor of the vendee. This case seems to recognize the rule stated in the text, but, in my opinion, by a mistaken course of reasoning. By the overwhelming weight of authority, the lien of a vendor, even when not reserved by any express language, is more than a mere equity; it is an equitable interest *in rem*, and entitled to preference over all subsequent equitable interests of no higher nature. See Rice v. Rice, 2 Drew. 73.

ing equitable liens upon specific parcels of land, have priority of right over the general statutory lien of subsequent docketed judgments, although the latter is legal in its nature. Judgment creditors are not "purchasers" within the meaning of the recording acts, and unless expressly put upon the same footing, they do not obtain the benefit which a subsequent purchaser does by a prior record. The equitable doctrine is, that a judgment and the legal lien of its docket binds only the actual interest of the judgment debtor, and is subject to all existing equities which are valid as against such debtor.[1] It follows as a necessary consequence, that, unless prevented by express statutory provisions, the equitable lien of a prior unrecorded mortgage given upon a specific parcel of land, should have precedence over the general legal lien of a subsequent docketed judgment against the owner of the mortgaged premises, even when the judgment was recovered and docketed without any notice to the

[1] The doctrine was well stated by Bartley, J., in White v. Denman, 1 Ohio St. 110, 112, although the decision upon the authority of earlier Ohio cases was not in accordance with it. "It is a principle of familiar application in equity jurisprudence, that a specific equitable interest in real estate, whether it be created by an executory agreement for the sale of land, or by deed so defectively executed as not to pass the legal estate, but treated in equity as a contract to convey, or even a vendor's lien, is upheld by courts of equity, and uniformly takes priority over judgment liens, assignments in bankruptcy, and assignments for the benefit of creditors generally." See also, Finch v. Earl of Winchelsea, 1 P. Wms. 277; Legard v. Hodges, 1 Ves. 477; Burn v. Burn, 3 Id. 573, 582; Lodge v. Tyseley, 4 Sim. 70; Beavan v. Earl of Oxford, 6 De G. M. & G. 507, 517, 518; Newlands v. Paynter, 4 My. & Cr. 408; Langton v. Horton, 1 Hare, 549; Everett v. Stone, 3 Story, 446, 455; Briggs v. French, 2 Sumn. 251. In the following cases the doctrine has been applied to a great variety of equitable interests, that of a vendee, to the lien of a vendor, to the interest of a *cestui que trust* whether the trust was express or by operation of law, to equitable mortgages or liens arising from contract, or from intended legal mortgages defectively executed, etc.. Ells v. Tousley, 1 Paige, 280; *In re* Howe, 1 Id. 125; White v. Carpenter, 2 Id. 217, 266; Gouverneur v. Titus, 6 Id. 347; Kiersted v. Avery, 4 Id. 9; Arnold v. Patrick, 6 Id. 310; Morris v. Mowatt, 2 Id. 586, 590; Buchan v. Sumner, 2 Barb. Ch. 165, 207; Hoagland v. Latourette, 1 Green's Ch. 254; Dunlap v. Burnett, 5 Sm. & Mar. 702; Money v. Dorsey, 7 Id. 15; Bank v. Campbell, 2 Rich. Eq. 179; Watkins v. Wassell, 15 Ark. 73, 94, 95; Cover v. Black, 1 Barr. 493; Shryock v. Waggoner, 4 Casey, 430; Hampson v. Edelen, 2 Har. & Johns. 64; Hackett v. Callender, 32 Vt. 97, 108, 109; Hart v. Farm. & Mech. B'k, 33 Id. 252; Brown v. Pierce, 7 Wall. 205; Baker v. Morton, 12 Id. 150. In these two latter cases the doctrine was applied to the equitable interest of a grantor who had executed a deed through duress, but had remained in possession, against a judgment creditor of the grantee. Notwithstanding this imposing array of authorities, the doctrine has been rejected or departed from in a few cases. In Richeson v. Richeson, 2 Gratt. 497, the lien of a vendor was held subordinate to the right of the vendee's creditor. In Bayley v. Greenleaf, 7 Wheat. 46, 51, the same preference was given to a subsequent judgment against the vendee over the lien of the vendor. The decision can not be of any weight, since C. J. Marshall doubts whether the vendor's lien exists at all in the law of this country, and expressly declares that there is no American case protecting it.

judgment creditor of each outstanding mortgage. This rule, which is plainly correct, as being in accordance with principle and preserving the consistency and symmetry of the equity jurisprudence, has been adopted and firmly established by the courts in many of the states.[1] The general rule wherever it thus prevails, is still susceptible to modifications and exceptions depending upon special circumstances.[2]

§ 722. **Contrary Rule in Some States, that the Subsequent Judgment has Precedence.**—A very different rule prevails in many states, in which it is settled that the lien of a subsequent docketed judgment prevails over that of a prior unrecorded mortgage or other prior equitable interest or lien not recorded, of which the judgment creditor had no notice at the time of recovering and docketing his judgment. This result is reached, in some of the states, from express provisions of the statutes, in others, from what was deemed to be the necessary

[1] In some of these cases it is a prior unrecorded deed that prevails over the subsequent judgment; but where this is so held of a deed, it must of necessity be also held of a mortgage. Stevens v. Watson, 4 Abb. App. Dec. 302; Wheeler v. Kirtland, 24 N. J. Eq. (9 C. E. Green), 552; Knell v. Build'g Ass'n, 34 Md. 67; Galway v. Malchow, 7 Neb. 285; Jackson v. Dubois, 4 John. 216; Schmidt v. Hoyt, 1 Edw. Ch. 652; Thomas v. Kelsey, 30 Barb. 268; Wilder v. Butterfield, 50 How. Pr. 385; *In re* Howe, 1 Paige, 125 (contract for a mortgage); Schroeder v. Gurney, 73 N. Y. 430 (a deed); Moyer v. Hinman, 13 N. Y. 180; 17 Barb. 137 (equitable interest of a vendee); Wilcoxson v. Miller, 49 Cal. 193 (deed); Pixley v. Huggins, 15 Id. 127 (deed); Plant v. Smythe, 45 Id. 161; Hunter v. Watson, 12 Id. 363; Rose v. Munie, 4 Id. 173; First Nat. B'k v. Hayzlett, 40 Iowa, 659; Hoy v. Allen, 27 Id. 208; Churchill v. Morse, 23 Id. 229; Evans v. McGlasson, 18 Id. 150; Welton v. Tizzard, 15 Id. 495; Patterson v. Linder, 14 Id. 414; Bell v. Evans, 10 Id. 353; Norton v. Williams, 9 Id. 528; Sappington v. Oeschli, 49 Mo. 244; Potter v. McDowell, 43 Id. 93; Stillwell v. McDonald, 39 Id. 282; Valentine v. Havener, 20 Id. 133; Apperson v. Burgett, 33 Ark. 328; Kelly v. Mills, 41 Miss. 267; Righter v. Forrester, 1 Bush (Ky.), 278; Morton v. Robards, 4 Dana, 258; Greenleaf v. Edes, 2 Minn. 264; Orth v. Jennings, 8 Blackf. 420; Hampton v. Levy, 1 McCord Ch. 107, 111. In Galway v. Malchow, 7 Neb. 285, *supra*, it is held that where land is omitted from a mortgage by mistake, the lien of a subsequent judgment against the mortgagor is still subject to the equity of the mortgagee and to the mortgage when corrected. This is a correct application of the equitable doctrine; but compare *per contra* Van Thorniley v. Peters, 26 Ohio St. 471.

[2] As illustrations: In Stevens v. Watson, 4 Abb. App. Dec. 302, while the rule is expressly recognized as ordinarily controlling, it is said to be otherwise where the subsequent judgment is one confessed to secure the repayment advanced at the time on the faith of it by the judgment creditor; and to the same effect is Hulett v. Whipple, 58 Barb. 224. In Wheeler v. Kirtland, 24 N. J. Eq. (9 C. E. Green), 552, it is held that an equitable mortgage for a precedent debt will not prevail over the lien of a subsequent valid judgment; between two such contestants, the first perfected legal lien should have preference. If the prior equitable mortgage arose upon a new consideration paid at the time, it would have priority of right. And in Dwight v. Newell, 3 N. Y. 185, it is said that where an equitable lien and a judgment lien come into existence at the same time, the former will not prevail unless it was given upon a new consideration advanced on the faith of it.

interpretation of the statutory language, and in a few, as it would seem, from an intentional rejection of the equitable doctrine which lies at the basis of the whole subject.[1]

§ 723. **Subsequent Judgment Creditor had Notice of the Prior Unrecorded Mortgage.**—In a large number of the states, including many of those which have adopted the rule as laid down in the last paragraph, if the judgment creditor has notice of a prior unrecorded mortgage, or other outstanding equitable lien upon or interest in the land of his judgment debtor, at the time when he recovers the judgment, the lien arising from the docket of his judgment is postponed to such prior incumbrance or equity.[2] In a few of the states, however, the statutory language is regarded as so peremptory, and the necessity of recording so complete, that even notice of an unrecorded mortgage or other subsisting equity, given to the creditor before the recovery and docketing of his judgment, is held not to affect the priority of the lien acquired by the subsequent docketed judgment.[3]

§ 724. **Between Prior Unrecorded Mortgage and a Purchase at Execution Sale under Subsequent Judgment.**—Having thus examined the relations subsisting between

[1] For the statutes see *ante*, § 646; Corpman v. Baccastow, 84 Pa. St. 363 (an absolute deed and a defeasance made at the same time constitute a mortgage, and if the deed only is recorded and the defeasance is not, they are to be regarded as an unrecorded mortgage, and postponed to a subsequent judgment); King v. Portis, 77 N. C. 25; Van Thorniley v. Peters, 26 Ohio St. 471 (a defective recorded mortgage when reformed, will not affect the lien of a judgment docketed between the execution and the reformation of the mortgage); White v. Denman, 1 Ohio St. 110, 112, 114; Mayham v. Coombs, 14 Ohio, 428; Jackson v. Luce, Id. 514; Holliday v. Franklin B'k, 16 Id. 533; Guiteau v. Wisely, 47 Ill. 433; McFadden v. Worthington, 45 Id. 362; Massey v. Westcott, 40 Id. 160; Reichert v. McClure, 23 Id. 516; Barker v. Bell, 37 Ala. 354; Mainwaring v. Templeman, 51 Tex. 205; Firebaugh v. Ward, 51 Id. 409; Cavanaugh v. Peterson, 47 Id. 197; Grace v. Wade, 45 Id. 522; Andrews v. Mathews, 59 Ga. 466; Young v. Devries, 31 Gratt. 304; Eidson v. Huff, 29 Id. 338; McClure v. Thistle's Ex'rs, 2 Id. 182; Anderson v. Nagle, 12 W. Va. 98; Uhler v. Hutchinson, 23 Pa. St. 110; Jaques v. Weeks, 7 Watts, 261; Hulings v. Guthrie, 4 Barr. 123; Hibberd v. Bovier, 1 Grant's Cas. (Pa.) 266; Mallory v. Stodder, 6 Ala. 801; Ohio Life Ins. & T. Co. v. Ledyard, 8 Id. 866; Pollard v. Cocke, 19 Id. 188 (these three cases are of unrecorded deeds).

[2] Priest v. Rice, 1 Pick. 164; Hart v. Farm. & Mech. B'k, 33 Vt. 252; Hackett v. Callender, 32 Id. 97, 108, 109; Cover v. Black, 1 Barr. 493; O'Rourke v. O'Connor, 39 Cal. 442; Britton's Appeal, 9 Wright, 172; Mellon's Appeal, 8 Casey, 121; Lawrence v. Stratton, 6 Cush. 163, 167; Goddard v. Prentice, 17 Conn. 546; Cox v. Milner, 23 Ill. 476; Ogden v. Haven, 24 Id. 57; Dixon v. Doe, 1 Sm. & Mar. 70; Ayres v. Duprey, 27 Tex. 593; Wyatt v. Stewart, 34 Ala. 716, 721; Burt v. Cassety, 12 Ala. 734; Wallis v. Rhea, 10 Id. 451; 12 Id. 646; Garwood v. Garwood, 4 Halst. 193.

[3] Guerrant v. Anderson, 4 Rand. 208; Davidson v. Cowan, 1 Dev. Eq. 474; Davey v. Littlejohn, 2 Ired. Eq. 495; Mayham v. Coombs, 14 Ohio, 428; Butler v. Maury, 10 Humph. 420; Lillard v. Ruckers, 9 Yerg. 64.

unrecorded mortgages and other equities, and the *liens* of subsequent docketed judgments, it remains to consider the effects produced by a judicial sale under such judgments. Several varying conditions of fact may exist, and conflicting rules concerning them prevail, to a certain extent, in different states. In the first place it is a rule universally adopted, and in strict accordance with the general doctrine concerning *bona fide* purchasers as established in this country, that in all the instances heretofore mentioned, even where the *lien* of a subsequent judgment is subject to an outstanding equity, if the judgment is enforced at a sheriff's sale, and the judgment debtor's land is sold and conveyed to a *bona fide* purchaser for a valuable consideration and without any notice, he stands in the position of any other *bona fide* purchaser who acquires the legal estate, and takes the land free from any unrecorded mortgage, and any outstanding equitable interest or lien *not appearing of record*, which might have affected the land in the hands of the judgment debtor. In other words, such a purchaser at the execution sale is to all intents a purchaser in good faith for a valuable consideration and without notice, as is described in the succeeding section.[1] Secondly, where the lien of the subsequent judgment is, in pursuance of the settled doctrine of equity, subject to a prior unrecorded mortgage or other outstanding equity even without notice thereof to the judgment creditor, and also where the lien of the judgment is thus subject because the judgment creditor had received notice before its recovery,

[1] Orth v. Jennings, 8 Blackf. 420; Rodgers v. Gibson, 4 Yeates, 111; Heister v. Fortner, 2 Binney, 40; Sieman v. Schurck, 29 N. Y. 598; Jackson v. Chamberlain, 8 Wend. 620, 625; Jackson v. Post, 15 Id. 588; 9 Cow. 120; Jackson v. Town, 4 Cow. 599; Gouverneur v. Titus, 6 Paige, 347; Den v. Richman, 1 Green, 43; Morrison v. Funk, 23 Pa. St. 421; Stewart v. Freeman, 10 Harris, 120, 123; Kellam v. Janson, 5 Id. 467; Mann's Appeal, 1 Barr. 24; Wilson v. Shoneberger, 10 Casey, 121; Scribner v. Lockwood, 9 Ohio, 184; Paine v. Mooreland, 15 Id. 435; Runyan v. McClellan, 24 Ind. 165; Ehle v. Brown, 31 Wisc. 405, 414; Rogers v. Hussey, 36 Iowa, 664; Draper v. Bryson, 26 Mo. 108; Harrison v. Cachelin, 23 Id. 117, 126; Waldo v. Russell, 5 Id. 387; Ohio Life Ins. & T. Co. v. Ledyard, 8 Ala. 866; Ayres v. Duprey, 27 Tex. 593, 605; Cooper v. Blakey, 10 Ga. 263; Miles v. King, 5 S. C. 146. It has even been held that if the judgment creditor purchases at the sheriff's sale, without notice, takes a conveyance, and has his bid applied in partial or full discharge of his judgment, he becomes a *bona fide* purchaser for value without notice, with all the rights belonging to that position. Gower v. Doheney, 33 Iowa, 36, 39; Halloway v. Platner, 20 Id. 121; and see Wood v. Chapin, 13 N. Y. 509. But this conclusion is clearly inconsistent with the settled doctrine concerning the nature of the "valuable consideration" which entitles a purchaser to the rights of a *bona fide* purchaser, and has been rejected by many decisions. Arnold v. Patrick, 6 Paige, 310, 316; Dickerson v. Tillinghast, 4 Id. 215; Wright v. Douglass, 10 Barb. 97; Sargent v. Sturm, 23 Cal. 359; Orme v. Roberts, 33 Tex. 768; Ayres v. Duprey, 27 Id. 593.

if the judgment is enforced, and the land is sold and conveyed to a purchaser who has duly received notice of the prior unrecorded mortgage or other subsisting equity, the inferiority of the judgment *lien* still remains and attaches to the conveyance which is the result of that lien. The purchaser under these circumstances is not a *bona fide* purchaser; he takes the *land* subject to the same incumbrances and equities which affected the lien of the docketed judgment.[1] Thirdly, wherever, in pursuance of the rule adopted in many states, the lien of a subsequent judgment is paramount to that of a prior unrecorded mortgage and to any outstanding equitable interest not of record, if the judgment is enforced and the land sold and conveyed to a purchaser *who has received notice* of the prior incumbrances or equities, the superiority of the lien still continues and attaches to the conveyance. The purchaser holds the land free from all such claims not of record, on the ground that when a right has once been vested and made absolute, it can not be divested or defeated by any mere notice. The judgment creditor having obtained a complete and fixed right, any notice which he might afterwards receive could not affect that right; nor would it be affected by a transfer to a purchaser having notice.[2]

§ 725. **Purchase-money Mortgages.**—Another very important instance in this country, of intrinsic superiority, is that of the purchase-money mortgage.[3] A mortgage to secure the purchase money of land, given at the same time with the deed

[1] This rule must clearly apply to the case of the judgment creditor who, having received notice, himself becomes the purchaser at the sheriff's sale. Ells v. Tousley, 1 Paige, 280; Gouverneur v. Titus, 6 Id. 347; Morris v. Mowatt, 2 Id. 586, 590; Parks v. Jackson, 11 Wend. 442; Siemon v. Schurck, 29 N. Y. 598; Moyer v. Hinman, 13 Id. 180 and cases cited, *per* Denio, J.; Bank v. Campbell, 2 Rich. Eq. 179; Churchill v. Morse, 23 Iowa, 229; Hoy v. Allen, 27 Id. 208; Chapman v. Coats, 26 Id. 288; O'Rourke v. O'Connor, 30 Cal. 442; Davis v. Ownsby, 14 Mo. 170; Valentine v. Havener, 20 Id. 133; Sappington v. Oeschli, 40 Id. 244, 246; Byers v. Engles, 16 Ark. 543; Prescott v. Heard, 10 Mass. 60; Ogden v. Haven, 24 Ill. 57; Ayres v. Duprey, 27 Tex. 593.

[2] Jaques v. Weeks, 7 Watts, 261, 270; Uhler v. Hutchinson, 23 Pa. St. (11 Harris), 110; Calder v. Chapman, 52 Pa. St. (2 P. F. Sm.) 359, 362; Massey v. Westcott, 40 Ill. 160; McFadden v. Worthington, 45 Id. 362; Guiteau v. Wisely, 47 Id. 433; Potter v. McDowell, 43 Mo. 93; Stillwell v. McDonald, 39 Id. 282; Davis v. Ownsby, 14 Id. 170; Greenleaf v. Edes, 2 Minn. 264; Henderson v. Downing, 24 Miss. 106; Kelly v. Mills, 41 Id. 267, 273; Fash v. Ravesies, 32 Ala. 451; De Vendell v. Hamilton, 27 Id. 156; Pollard v. Cocke, 19 Id. 188; Smith v. Jordan, 25 Ga. 687. The conclusion reached by these cases, which seems to be in such direct antagonism with well-settled doctrines concerning the effect of notice upon the rights of purchasers, is in most instances the result of what is supposed to be the imperative language of the recording statutes.

[3] See 1 Jones on Mortg., §§ 464–466, from which I have borrowed in this paragraph.

of conveyance, or in pursuance of agreement as a part of the same transaction, has precedence, so far as it is a charge upon the particular parcel of land, over judgments and other debts of the mortgagor.[1] It is a familiar rule, in those states where the common law dower exists, that such a mortgage, although not executed by the wife, takes precedence over her dower right in the same land.[2] The statutes of some states give a purchase-money mortgage precedence over a previous judgment recovered against the mortgagor. This provision applies only to mortgages executed by the grantee directly to his grantor, and not to those executed to third persons as security for money loaned for the purpose of paying the purchase price.[3] Even in the absence of any statute, and upon the general principles of equity, a purchase-money mortgage given at the same time as the deed, or as a part of the same transaction, has precedence over any prior general lien, such as that of a prior judgment against the mortgagor.[4] The same equitable rule applies in like manner to a mortgage given by the grantee to a third person, as security for money loaned for the purpose of being used, and which is

[1] In many states this is expressly enacted by statute.

[2] Mills v. Van Voorhies, 20 N. Y. 412; McGowan v. Smith, 44 Barb. 232; Kittle v. Van Dyck, 1 Sanf. Ch. 76; Clark v. Munroe, 14 Mass. 351; Young v. Tarbell, 37 Me. 509; Birnie v. Main, 29 Ark. 591.

[3] Heuisler v. Nickum, 38 Md. 270; Alderson v. Ames, 6 Id. 52, 56; Clabaugh v. Byerly, 7 Gill, 354; Stansele v. Roberts, 13 Ohio, 148. As to other matters arising under such statutes, see Ahern v. White, 39 Md. 409; Heuisler v. Nickum, 38 Id. 270; Cake's Appeal, 23 Pa. St. 186; Foster's Appeal, 3 Id. 79; Banning v. Edes, 6 Minn. 402; Stephenson v. Haines, 16 Ohio St. 478; Maybury v. Brien, 15 Pet. 21.

[4] Curtis v. Root, 20 Ill. 53; Fitts v. Davis, 42 Id. 391; Grant v. Dodge, 43 Me. 489; Banning v. Edes, 6 Minn. 402; Bolles v. Carli, 12 Id. 113. In Curtis v. Root, *supra*, Caton, C. J., said: "It is a principle of law too familiar to justify a reference to authorities, that a mortgage given for the purchase money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and mortgage being simultaneous acts, the title to the land does not for a single moment vest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during this instantaneous passage the judgment lien can not attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor may be supposed to have for the purchase money." Whatever of truth there may be in the reason thus assigned, it is certainly not all the truth. In the first place, the notion that the title passes through the mortgagor and vests in the mortgagee, and that the mortgagor obtains but an instantaneous seisin, has been entirely abandoned in very many of the states, and the mortgagee is regarded as acquiring only a lien. In the second place, since the grantor exchanges his ownership of the land for the lien of the mortgage, so that the mortgage in his hands represents the title to the land which he has conveyed, it is very clear that the mortgage, so far as it is a specific charge upon the very land, is intrinsically superior to any other general lien, although existing prior in time.

actually used in paying the purchase price.[1] A substitution of one species of lien for another, by changing the form of the security given for the purchase money, does not affect the operation of the rule.[2] The purchase-money mortgage not only thus takes precedence of a prior judgment, but it also cuts off or prevents the attachment of any other lien upon the premises, which might otherwise have affected them.[3]

§ 726. **Other Illustrations.**—In addition to these most important questions of priority between different equitable liens, there may be many other particular instances in which a subsequent interest is intrinsically superior, or an earlier one intrinsically inferior, so as to determine the precedence between them. A few may be mentioned by way of illustration. Fraud inhering in a prior mortgage, incumbrance, or other apparent claim, will of course postpone it to a subsequent valid lien.[4] A prior equitable lien upon chattels arising from contract will not prevail against a subsequent chattel mortgage which has been perfected and filed according to statute.[5] The priority among liens may also be fixed by express agreement among the parties at the time they are created, so as even to follow them sometimes into the hands of an assignee.[6]

§ 727. **III. A Subsequent Equity Protected by the**

[1] Beebe v. Austin, 15 Johns. 477; Haywood v. Nooney, 3 Barb. 643; Adams v. Hill, 9 Fost. 202; Curtis v. Root, 20 Ill. 53.

[2] As, for example, substituting a deed of trust for the mortgage. Curtis v. Root, 20 Ill. 53; Austin v. Underwood, 37 Id. 438.

[3] As illustrations: A lien for work and materials furnished, or a mechanic's lien for a building erected, on behalf of the grantee, after the purchase was arranged, but before the deed and mortgage were executed. Virgin v. Brubaker, 4 Nev. 31; Guy v. Carriere, 5 Cal. 511; Strong v. Van Deursen, 23 N. J. Eq. (8 C. E. Green), 369; Lamb v. Cannon, 33 N. J. Law, 362; Macintosh v. Thurston, 25 N. J. Eq. (10 C. E. Green), 242. A contract concerning the premises made by the grantee before the purchase. Bolles v. Carli, 12 Minn. 113; Morris v. Pate, 31 Mo. 315. A homestead right on the land. Hopper v. Parkinson, 5 Nev. 233; Nichols v. Overacker, 16 Kans. 54; Pratt v. Topeka B'k, 12 Id. 570; Carr v. Caldwell, 10 Cal. 380; Magee v. Magee, 51 Ill. 500; Allen v. Hawley, 66 Id. 164, 168; Austin v. Underwood, 37 Id. 438; Amphlett v. Hibbard, 29 Mich. 298; New England etc. Co. v. Merriam, 2 Allen, 391; Lane v. Collier, 46 Ga. 580.

If a grantee, as a part of the same transaction, gives back a purchase-money mortgage to his grantor, and also gives another mortgage to a third person, and the deed and two mortgages are all recorded at the same time, the purchase-money mortgage is entitled to a precedence over the other. Clark v. Brown, 3 Allen, 509. As to the effect of delay in the recording, see Dusenbury v. Hulbert, 2 T. & C. 177.

[4] Kelly v. Lenihan, 56 Ind. 448 (fraudulent mortgage and subsequent judgment); Eggeman v. Eggeman, 37 Mich. 436 (prior fraudulent and subsequent val'd mortgage).

[5] Smith v. Worman, 19 Ohio St. 145. The equitable lien in favor of a lessor, arising from a stipulation in the lease, upon the lessee's chattels which were placed upon the premises, postponed to a subsequent chattel mortgage given by the tenant, which had been duly filed, etc.

[6] Balkum v. Owens, 47 Ala. 266, as an illustration.

Legal Title.—The case to be considered is not that merely of an equitable interest held by A., and a subsequent conveyance of the legal estate to B., in which the latter's superior right would be a simple application of the doctrine concerning *bona fide* purchase for a valuable consideration. The subject to be examined assumes the existence of successive equities held by different persons, equal in their nature, and acquired in such a manner that, having regard to these interests alone, the priority of right among them would depend upon their order of time. Under these circumstances it is assumed that one of the parties acquires, in some manner, the legal title in addition to his equity. The settled doctrine is, that if a second or other subsequent holder, who would otherwise be postponed to the earlier ones, obtains the legal estate, or acquires the best right to call for the legal estate, he thereby secures an advantage which entitles him to a priority.[1] It is absolutely essential, however, that he should have acquired his *equitable* interest without any notice of the prior claims, and that his subsequent procurement of the legal estate should be free from fraud and from undue negligence.[2] Several illustrations are placed in the foot-note.[3]

[1] In this country the practical examples of this rule would generally if not always be instances of *bona fide* purchase for a valuable consideration, and governed by the doctrine on that subject; but the rule does not require such a state of facts. In other words, the rule does not require that the one who protects himself by getting the legal estate, should be in all respects a *bona fide* purchaser of that estate for a valuable consideration and without notice. The rights of mere priority and the rights of a *bona fide* purchase, are by no means identical.

[2] The effects of fraud and negligence in defeating the precedence which would otherwise follow the legal title, are considered in the subsequent head V (§§ 731, 732).

[3] Cave v. Cave, L. R., 15 Ch. D. 639. A trust existed in favor of A. The trustee used the funds in purchasing an estate which was conveyed to B. (the trustee's brother) so that the legal title was vested in him. Afterwards money was raised for or in the name of B., and secured by a first legal mortgage on the land given to C., one of the lenders, and subsequent equitable mortgages given to D. and E., other lenders. All these transactions were made without any notice of the original trust given to C., D., or E. *Held*, that as been the original *cestui que trust* A. and the first mortgagee C., the latter was entitled to the precedence, since he had a legal estate; but as between A. and the mortgagees D. and E., A. was prior in right, since all their interests were equitable and he was prior in time. This case well illustrates both rules. Hunter v. Walters, L. R., 7 Ch. 75. There were two outstanding mortgages upon a piece of land, of which the first alone was legal, and both mortgagees employed the same solicitor A. By his procurement both mortgagees united in a deed of conveyance to their solicitor A. This deed was given voluntarily, and intending to vest the legal title in A., but was in fact grossly fraudulent as against the mortgagees. Still the apparent legal title was held by A., although liable to be set aside. He took possession of the land, and claiming to be owner gave an equitable mortgage on it to B., to secure payment of money borrowed from B., he acting in good faith and without notice. B.'s equitable mortgage was held entitled to priority over the two original mortgagees, because he held

§ 728. **Legal Estate Obtained from a Trustee.**—Such being the general rule, there are special circumstances in which the acquisition of the legal estate even without notice, will not confer a priority. Thus, it seems now to be settled by the most recent English decisions that where the legal estate is vested in a trustee, and the holder of a subsequent equitable interest, even without notice of the prior equities, obtains a conveyance of the legal estate from the trustee which would of itself be a breach of the trust, provided the conveyance is not so made as to constitute himself a *bona fide* purchaser from the trustee for a valuable consideration and without notice—he does not thereby acquire a precedence over the existing equities which are prior in time, because the act is necessarily a breach of trust.[1] It is settled that where the legal estate is vested in a trustee for a prior incumbrancer, a subsequent equitable incumbrancer

under the legal title in A., and through the laches of the original mortgagees which made the fraud possible, he obtained a higher right as against them. See, also, Ratcliffe v. Barnard, L. R., 6 Ch. 652, and Hewitt v. Loosemore, 9 Hare, 449; Fitzsimmons v. Ogden, 7 Cranch, 2; Newton v. McLean, 41 Barb. 285. Land was conveyed to A. by a deed absolute on its face, and vesting an apparently perfect legal estate, but in fact the land was held in trust for B., and it was not intended that A. should have any beneficial interest. In this condition A. executed a mortgage on the land to C. for a valuable consideration and without notice. *Held*, that C. was protected against B.'s interest, because the mortgage clothed him with the legal estate. This can hardly be the correct reason according to the law of New York, by which a mortgage never conveys the legal estate. C. would probably be protected by the recording acts. Beall v. Butler, 54 Ga. 43. The statutory lien of a laborer on his employer's property is cut off by a sale and conveyance to a purchaser without notice. In Jones v. Lapham, 15 Kans. 540, it is held that, between a prior lien upon an equitable interest, and a subsequent lien upon the full legal estate, the latter is preferred, if the holder acquired without notice; but not if at the time of obtaining his lien he knew of the outstanding equity and the prior lien thereon. Fox v. Palmer, 25 N. J. Eq. (10 C. E. Green), 416. A mortgage signed in blank and given to an agent by whom it is afterwards filled up and delivered, is not a valid and legal mortgage. At most, it only creates an equitable lien which can be enforced between proper parties. As such, it will not prevail over the subsequent equitable interest of another who has also the legal title. Straus v. Kerngood, 21 Gratt. 584. Between two equal equitable liens, the holder who obtains the legal advantage of a judgment, will prevail over the other.

[1] It must be carefully borne in mind, or else confusion will be inevitable, that the question under examination is one of *priority* merely, and not of the rights obtained through a *bona fide* purchase for value. Mumford v. Stohwasser, L. R., 18 Eq. 556, 562, 563. Sir George Jessel, M. R., after quoting with approval the language of L. J. James, in Pilcher v. Rawlins, adds: "This would be the case of a trustee knowing that he was a trustee assigning over the legal estate to a person who did not know he was a trustee, that person having previously acquired an equitable interest; and I should hold, if that point came for decision, which I think does not in this case, that the second equitable incumbrancer or the purchaser of the equity did not thereby gain any priority; in other words, that a person knowing he is a trustee can not, *without receiving value at the time*, by committing a breach of trust, deprive his own *cestui que trust* of his rights." See also Pilcher v. Rawlins, L. R., 7 Ch. 259, 263, *per* James, L. J.

gains no priority by obtaining a conveyance of it from such trustee.[1] Also where there are successive equitable mortgages, the legal estate remaining in the mortgagor, the mortgagor can not *himself* give priority to a subsequent incumbrancer by conveying the legal estate to him. Here, also, it must be understood that the second incumbrancer getting the legal title is not a *bona fide* purchaser for a valuable consideration.[2]

§ 729. **Legal Estate Obtained after Notice of a Prior Equity.**—One further question remains to be examined. It has already been stated as an essential part of the general rule, that the subsequent equitable lien or other interest must be completely acquired, and of course the consideration upon which it is founded fully parted with, without notice of any prior equity, in order that the holder may be protected by getting the legal estate. The question is, whether the legal estate must also be obtained before any notice is received of the prior equity? One particular case involving this question, but depending upon special reasons, is well settled. If a person becomes holder in good faith of an equitable interest without notice of an existing trust, and afterwards, upon receiving notice of the trust, he obtains a conveyance of the legal estate from the trustee, he can not protect himself against nor even assert priority over the right of the *cestui que trust*, for his act has necessarily made him a party to a breach of trust.[3] Does the same rule extend to all instances of a legal estate procured by the holders of subsequent equitable mortgages, liens, and other equitable interests? There is some conflict, or apparent conflict of opinion upon this point, but it all arises, I think, from the failure to distinguish mere rights of priority from the more complete rights of defense belonging to the *bona fide* purchaser for a valuable consideration. The confounding of these two entirely distinct and separate matters can only lead to a confusion of decisions and rules.[4] The very object of the rule

[1] Allen v. Knight, 5 Hare, 272, affirmed in 11 Jur. 527; and see Wilmot v. Pike, 5 Hare, 22.

[2] Sharples v. Adams, 32 Beav. 213, 216. The reason undoubtedly is, that under such circumstances the mortgagor is regarded as a trustee for all the equitable mortgagees.

[3] Mumford v. Stohwasser, L. R., 18 Eq. 556, 563; Saunders v. Dehew, 2 Vern. 271; Allen v. Knight, 5 Hare, 272; Sharples v. Adams, 32 Beav. 213; Carter v. Carter, 3 K. & J. 617. In fact, it seems that the mere obtaining the legal estate from the trustee without notice would not give him *priority*.

[4] In a case of priorities merely, the court in a proper proceeding awards the subject-matter to the various claimants in the order of precedence; in the other case it refuses any relief to the plaintiff attempting to establish his title or claim against the *bona fide* purchaser. This most important distinction is not always sufficiently observed in the exhaustive American notes to Basset v. Nosworthy, and Le Neve v. Le Neve, in 2 Eq. Lead. Cases.

is, that a person who has in good faith become holder of an equitable lien or interest, on discovering his danger of being postponed to an outstanding equity already in the hands of another, may protect himself and secure his priority by procuring the legal title. Principle and authority seem to be agreed, that such a holder of a subsequent equity, who obtained it for value and without notice, may, even after notice of an earlier equity in favor of a third person, secure the advantage given by a conveyance of the legal estate, and thus establish his own priority. By this act, the subsequent holder would become entitled to *priority*. The decisions and *dicta* which conflict with this conclusion will be found, upon examination, to be dealing with the alleged rights of a *bona fide* purchaser for value, and not with a mere question of priority.[1]

§ 730. **IV. Notice of Existing Equities.**—The doctrine is universally settled, and has already been fully examined, that, among successive interests wholly equitable, and between an earlier equity and a subsequent legal estate, even when purchased for a valuable consideration, the one who acquires the subsequent estate or interest with notice of the earlier equity in favor of another person, will hold his acquisition subject and subordinate to such outstanding interest or right; in the contest for priority between the two claimants, he must be postponed; he takes his interest burdened with the obligation of recognizing, providing for, and carrying out the previous equity according to its nature. This subordinating effect is produced alike by every species of notice; actual notice proved by direct or inferred from circumstantial evidence, and constructive notice arising from information sufficient to put the prudent man

[1] While the proposition of the text is implied by many text-writers, it is expressly announced by Mr. Adams, as a settled rule in the adjustment of priorities (pp. 161, 162, marg. pag. p. 339, 6th Am. ed.) See, also, Brace v. Duchess of Marlborough, 2 P. Wms. 491; Belchier v. Butler, 1 Eden, 523; Wortley v. Birkhead, 2 Ves. Sen. 571; *Ex parte* Knott, 11 Ves. 609, 619; Leach v. Ansbacher, 55 Pa. St. (5 P. F. Sm.) 85; Baggerly v. Gaither, 2 Jones Eq. 80; Carroll v. Johnston, 2 Id. 120, 123; Fitzsimmons v. Ogden, 7 Cranch, 2, 18; Siter v. McClanachan, 2 Gratt. 280, 283; Zollman v. Moore, 21 Id. 313; Osborn v. Carr, 12 Conn. 195, 208; Gibler v. Trimble, 14 Ohio, 323; Campbell v. Brackenridge, 8 Blackf. 471. In some of these American decisions, the rule may, under a mistaken view of the English authorities, be carried too far, and applied to a party who was asserting the rights of a *bona fide* purchaser. The cases of Grimstone v. Carter, 3 Paige, 421, 437, and Fash v. Ravesies, 32 Ala. 451, appear to be opposed to this rule, but they are really dealing with the *bona fide* purchaser, and not with priorities. In the first, the chancellor says, "that *to enable a party to defend himself as a bona fide purchaser*, he must state, not only that there was equal equity in himself by reason of his having paid the purchase money, but also that he had clothed his equity with the legal title before he had notice of the prior equity."

upon an inquiry, from possession, from the contents of title-deeds, from *lis pendens*, from registration, from information given to an agent, or from any other cause, when once established, are followed by the same consequences upon the rights of the subsequent holder or purchaser. The doctrine applies to all successive equities in the same subject-matter, even where they are equal and governed by the order of time, and in such a case it does not disturb the priority already existing. Its special and most important application is where the subsequent equitable interest is superior in its intrinsic nature or from some incident, or where the subsequent interest is a legal estate, or where it possesses the advantage resulting from the compliance with some statutory requirement, so that the holder thereof would, in the absence of notice, be entitled to the preference; and its effect is then to defeat the precedence which would otherwise have existed, and to restore the priority from order of time among the successive claimants. By far the most frequent application of the doctrine in this country has been in connection with the recording acts, where the superiority of title or of lien otherwise acquired by the recording of a conveyance, mortgage, or other instrument, has been held to be lost by reason of a notice of some outstanding unrecorded estate, title, mortgage, lien, or other equitable interest. As the doctrine of notice, both with respect to its nature and its effects, has already been discussed as fully as my limits will permit, I shall add nothing further here except a few cases placed in the foot-note by way of illustration.[1]

[1] Bradley v. Riches, L. R., 9 Ch. D. 189; Greaves v. Tofield, 14 Id. 563; Baker v. Gray, 1 Id. 491; Maxfield v. Burton, L. R., 17 Eq. 15; Dryden v. Frost, 3 My. & Cr. 670; Whitbread v. Jordan, 1 Y. & C. 303; Holmes v. Powell, 8 De G. M. & G. 572; Atterbury v. Wallis, 8 Id. 454; Penny v. Watts, 1 Macn. & G. 150; Jones v. Smith, 1 Hare, 43, 55; Ware v. Lord Egmont, 4 De G. M. & G. 460, 473; Greenfield v. Edwards, 2 De G. J. & S. 582; Montefiore v. Browne, 7 H. L. Cas. 241, 269; Wason v. Wareing, 15 Beav. 151; Hipkins v. Amery, 2 Giff. 292; Prosser v. Rice, 28 Beav. 68, 74; Barnhart v. Greenshields, 9 Moo. P. C. 18; Birch v. Ellames, 2 Anstr. 427; Gibson v. Ingo, 6 Hare, 112, 124; Jones v. Williams, 24 Beav. 47; Mackreth v. Symmons, 15 Ves. 329, 350; Tourville v. Naish, 3 P. Wms, 307; Maundrell v. Maundrell, 10 Ves. 246, 271; Tildesley v. Lodge, 3 Sm. & Giff. 543; Wigg v. Wigg, 1 Atk. 382, 384; Rayne v. Baker, 1 Giff. 241; Harrison v. Forth, Prec. Chan. 51; Ferrars v. Cherry, 2 Vern. 383; Mertins v. Jolliffe, Ambl. 313; Lowther v. Carlton, 2 Atk. 242; Kennedy v. Daly, 1 Sch. & Lef. 355, 379; Merry v. Abney, 1 Chan. Cas. 38; Earl Brook v. Bulkeley, 2 Ves. Sen. 498; Taylor v. Stibbert, 2 Ves. 437; Daniels v. Davison, 16 Id. 249; Van Meter v. McFaddin, 8 B. Mon. 435; School Dist. v. Taylor, 19 Kans. 287 (recorded mortgage held subject to a prior unrecorded deed by reason of the absolute constructive notice from the open possession by the grantee, although the mortgagee had no actual knowledge of such possession); *In re* Sands Brewing Co., 3 Biss. 175 (effect of notice of a covenant in prior conveyance to a subsequent purchaser.)

§ 731. **V. Effect of Fraud or Negligence upon Priorities.**—A priority which would otherwise have existed may also be disturbed and defeated by fraud or negligence in obtaining the interest or in failing to secure it properly. It is therefore a settled doctrine that among successive equities otherwise equal, and also between a legal title or superior equitable interest earlier in time and a subsequent equity, the holder of the interest which is prior in time and would be prior in right, may lose his precedence, and be postponed to the subsequent one by his own fraud or negligence, or that of his agent. The same rule applies to the holder of a subsequent legal estate, who would otherwise have the precedence over a prior equitable interest; he may be postponed by reason of his neglect or fraud. While the general rule has been fully adopted by the American courts, the cases involving it are much less frequent in this country than in England, because almost every kind of interest in land is within the operation of the recording acts, and may be protected by a record. Most instances of *laches*, therefore, coming before our courts have arisen from a neglect to record an instrument, or to comply with the provisions of some statute analogous to that of recording.[1] The effects of negligence and want of diligence in postponing or even defeating the rights of an assignee of a thing in action, earlier in point of time, have already been described.[2] One instance which may be regarded as an example of fraud, although no *actual* fraudulent intent is essential, is, where a prior incumbrancer, upon inquiry being made by a person interested, denies the existence of his lien, or where the owner of the legal estate denies his title under like circumstances, or even keeps silent and does not announce his title to an innocent person who is making expenditures, or advancing money upon the supposed security of the property.[3]

[1] See, as examples of fraud in a prior mortgage, Kelly v. Lenihan, 56 Ind. 448; Eggeman v. Eggeman, 37 Mich. 436. For examples of neglect, Fisher v. Knox, 1 Harris, 622; Hendrickson's Appeal, 12 Id. 363; Rider v. Johnson, 8 Id. 190, 193; Campbell's Appeal, 5 Casey, 401; Garland v. Harrison, 17 Mo. 282.

[2] See *ante*, §§ 698–702.

[3] These instances may undoubtedly be referred to the doctrine of equitable estoppel; but the notion of constructive fraud lies at the foundation of that doctrine. Examples of prior mortgagee losing his priority, by denying his own security, to an intended mortgagee who makes inquiry and states that he is about to lend money on the same property: Ibbeteson v. Rhodes, 2 Vern. 554; Berrisford v. Milward, 2 Atk. 49; see Stronge v. Hawkes, 4 De G. M. & G. 186; 4 De G. & J. 632; Beckett v. Cordley, 1 Bro. Ch. 353, 357; Pearson v. Morgan, 2 Id. 385, 388; Evans v. Bicknell, 6 Ves. 173, 182; Lee v. Munroe, 7 Cranch, 366, 368; Brinkerhoff v. Lansing, 4 Johns. Ch. 65. Examples of legal owner concealing his title, and suffering others to expend money, etc.: Storrs v. Barker, 6 Johns. Ch. 166, 168; Wendell v. Van Rensselaer, 1 Id. 344; Bright v. Boyd, 1 Story, 478; see Eldridge v. Walker,

§ 732. **Effect of Gross Negligence.**—It is now settled by the English decisions, after some fluctuation, that where a person has become entitled to the precedence, because he has acquired the *prior* legal estate, or because being subsequent in time he has fortified his equity by obtaining the legal estate, he can not lose such precedence and be postponed, unless by himself or by his agent he is chargeable with fraud or with gross negligence; mere neglect will not suffice.[1] Whether the same requirement of gross negligence applies to successive interests which are all purely equitable, or whether mere negligence is sufficient to affect the priority, must be regarded as still unsettled by the decisions.[2]

§ 733. **Assignments of Mortgages—Rights of Priority Depending upon.**—An assignment of a mortgage is, throughout this country, with the exception perhaps of a very few states, a mere transfer of a thing in action, and the assignee can acquire no higher rights as against the mortgagor than those possessed by the original mortgagee.[3] Such assignments are generally within the operation of the recording statutes, either in express terms, or by a judicial interpretation of the statutory language, holding that an assignment is a species of conveyance.[4] The record of an assignment, like that of any other in-

80 Ill. 270; see, also, Platt v. Squire, 12 Metc. 494; Fay v. Valentine, 12 Pick. 40; Marston v. Brackett, 9 N. H. 336; Miller v. Bingham, 29 Vt. 82; Stafford v. Ballou, 17 Id. 329; Broome v. Beers, 6 Conn. 198; Rice v. Dewey, 54 Barb. 455; L'Amoreux v. Vandenbergh, 7 Paige, 316; Paine v. French, 4 Ohio, 318; Chester v. Greer, 5 Humph. 26.

[1] The cases furnish a great variety of instances and forms of fraud or neglect. The leading case is Hewitt v. Loosemore, 9 Hare, 449; see, also, Tourle v. Rand, 2 Bro. Ch. 650; Barnett v. Weston, 12 Ves. 129; Colyer v. Finch, 5 H. L. Cas. 905; Espin v. Pemberton, 4 Drew. 333; 3 De G. & J. 547; Hopgood v. Ernest, 3 De G. J. & S. 116; Ratcliffe v. Barnard, L. R., 6 Ch. 652. The following cases are illustrations of negligence insufficient to affect the priority acquired by means of the legal estate: Dixon v. Muckleston, L. R., 8 Ch. 155; Ratcliffe v. Barnard, 6 Id. 652; Cory v. Eyre, 1 De G. J. & S. 149, 163; Hunt v. Elmes, 2 De G. F. & J. 578; Roberts v. Crofts, 2 De G. & J. 1; Hewitt v. Loosemore, 9 Hare, 449. Examples of neglect sufficient to destroy a precedent otherwise existing: Worthington v. Morgan, 16 Sim. 547; Rice v. Rice, 2 Drew. 73; Briggs v. Jones, L. R., 10 Eq. 92; Hopgood v. Ernest, 3 De G. J. & S. 116; Perry Herrick v. Attwood, 2 De G. & J. 21; Waldron v. Sloper, 1 Drew. 193; Carter v. Carter, 3 K. & J. 617. Examples of fraud. Hunter v. Walters, L. R., 7 Ch. 75; Sharpe v. Foy, 4 Id. 35; Lloyd v. Attwood, 3 De G. & J. 614. See further as to the neglect in making proper inquiry, and the notice resulting therefrom, *ante*, § 612.

[2] See *supra*, note under § 687, where the recent English cases upon this question are cited.

[3] See *ante*, § 704; Wanzer v. Cary, 76 N. Y. 526.

[4] See 1 Jones on Mortg., §§ 472–478, where the subject is fully discussed, and from which I have borrowed. In the recent and very carefully considered case of Westbrook v. Gleason, 79 N. Y. 23, it is held that an assignment is a "conveyance" within the general requirements of the recording act, and therefore when a second mortgagee, with notice of a prior unre-

strument, does not operate as a notice retrospectively; it is not therefore a constructive notice of the assignee's interest to the mortgagor, so as to destroy the effect of payments made by him, without actual notice to the mortgagee; but a mortgagor who obtains a discharge from the mortgagee *without any payment*, is not protected as against the assignee.[1]

§ 734. **Unrecorded Assignment: Rights of the Assignee.** When a mortgage duly recorded is assigned, that original record continues to be constructive notice of the existence of the lien to all subsequent purchasers and incumbrancers of the same premises, and the assignee does not lose his precedence over such parties by a failure to record the assignment.[2] A conveyance of the mortgaged premises to the mortgagee after

corded mortgage, assigns his mortgage to a *bona fide* purchaser for value, who has no notice, such assignee is entitled to preference only in case he records his assignment before the first mortgage is recorded; if the first mortgage is recorded before the assignment is put on record, that operates as a constructive notice to the assignee and cuts off his priority. From this it appears that the effects of recording an assignment are not confined, as has sometimes been supposed, to the rights of successive assignees of the same mortgage. In illustration of the text, see Belden v. Meeker, 47 N. Y. 307; 2 Lans. 470; Campbell v. Vedder, 1 Abb. App. Dec. 295; Fort v. Burch, 5 Denio, 187; Vanderkemp v. Shelton, 11 Paige, 28; James v. Johnson, 6 Johns. Ch. 417; St. John v. Spalding, 1 T. & C. 483; Byles v. Tome, 39 Md. 461; Bowling v. Cook, 39 Iowa, 200; Bank of State of Ind. v. Anderson, 14 Id. 544; Cornog v. Fuller, 30 Id. 212; McClure v. Burris, 16 Id. 591; Henderson v. Pilgrim, 22 Tex. 464. In Pennsylvania it is held, under a construction of the general statute, that a record of an assignment is notice to subsequent assignees, and also to subsequent mortgagees and purchasers of the same premises. Pepper's Appeal, 77 Pa. St. 373; Neide v. Pennypacker, 9 Phila. 86; Leech v. Bonsall, 9 Id. 204; Philips v. B'k of Lewiston, 18 Pa. St. 394, 401. In Indiana it is held, upon a construction of the statute, that no provision is made for recording assignments, and therefore a record of them is not notice. Hasselman v. McKernan, 50 Ind. 441. It necessarily follows that when a mortgage is assigned, and the assignment is not recorded, and the mortgagee afterwards satisfies the mortgage of record, the lien is thereby destroyed as against a *bona fide* purchaser or incumbrancer without notice of the premises. Bowling v. Cook, 39 Iowa, 200; Henderson v. Pilgrim, 22 Tex. 464; and see Warner v. Winslow, 1 Sandf. Ch. 430; St. John v. Spalding, 1 T. & C. 483.

[1] N. Y. Life Ins. & T. Co. v. Smith, 2 Barb. Ch. 82; Ely v. Scofield, 35 Barb. 330. This rule is held not to apply to a mortgage given to secure a negotiable note which is assigned before maturity. Jones v. Smith, 22 Mich. 360. The record of an assignment is, however, a constructive notice to a subsequent grantee of the mortgagor, and a subsequent discharge given to him by the mortgagee would be inoperative as against the assignee. Also a discharge obtained by the mortgagor without any payment, is ineffectual. Belden v. Meeker, 47 N. Y. 307; 2 Lans. 470, and see Westbrook v. Gleason, 79 N. Y. 23.

The rule given in the text as to the effect of the record as notice to the mortgagor is expressly enacted by the statutes of several states. *California.*—Civ. Code, §§ 2934, 2935. *Indiana.*—Gavin & Hord's Stat., v. 2, p. 356. *Kansas.*—Dassler's Stat., c. 68, § 3. *Michigan.*—Comp. Laws, p. 1347. *Minnesota.*—Rev. Stat. (1866) p. 331. *Nebraska.*—Gen. Stat., c. 61, § 39. *New York.*—Fay's Dig. of Laws, v. 1, p. 585. *Oregon.*—Gen. Laws, p. 651. *Wisconsin.*—Rev. Stat., p. 1149.

[2] Campbell v. Vedder, 3 Keyes, 174; 1 Abb. App. Dec. 295.

he had assigned the mortgage, would not work a merger, but the rights of the assignee would remain unaffected.[1] If the mortgagee, having thus acquired title after the assignment, should in turn convey the mortgaged premises to a third person without knowledge nor actual notice of the assignment, it is held that such grantee would be charged with constructive notice and would take subject to the rights of the assignee, because the records would give him notice of facts sufficient to put a reasonable man upon an inquiry, and a due inquiry would necessarily lead to a discovery of the real situation.[2] If a second mortgagee, with notice of a prior unrecorded mortgage, assigns to a *bona fide* purchaser without notice, but the prior mortgage is recorded before the assignment, the assignee would fail to secure a precedence.[3] Since a mortgage is a thing in action, an assignee even without notice will be subject to all outstanding equities and claims in favor of third persons, which were existing and available against the assignor, wherever the general doctrine prevails that all assignments of things in action are subject to such latent equities.[4] Questions of priority might arise between successive assignees of the same mortgage from the same assignor. If an assignment is perfected by an actual delivery of the mortgage itself and of the bond, note, or other evidence of debt secured, even though it be not recorded, a subsequent assignee would necessarily be put upon an inquiry, and chargeable with constructive notice, and could obtain no precedence even by a first record.[5] In other instances where the assignments are equal, made for a valuable consideration and without notice, if all were unrecorded, the earliest in order of time prevails; the assignee for value and without notice who first obtains a record, secures thereby the title; a record when made is a constructive notice to all subsequent assignees of the same mortgage.[6]

[1] Purdy v. Huntington, 42 N. Y. 334; Campbell v. Vedder, *supra*.

[2] Purdy v. Huntington, 42 N. Y. 334, overruling 46 Barb. 389; Gillig v. Maass, 28 N. Y. 191; Warren v. Winslow, 1 Sandf. Ch. 430; Van Keuren v. Corkins, 4 Hun, 129; 6 T. & C. 355.

[3] Westbrook v. Gleason, 79 N. Y. 23; Fort v. Burch, 5 Denio, 187. The same would be true where, a junior mortgage being assigned, the elder mortgage was recorded before the assignment was given, although after the recording of the junior mortgage assigned. Id.

[4] See *ante*, §§ 708, 709, 714, and cases cited; Conover v. Van Mater, 18 N. J. Eq. 481; *per contra*, see *ante*, § 715 and cases cited; Sumner v. Waugh, 56 Ill. 531.

[5] Kellogg v. Smith, 26 N. Y. 18; Brown v. Blydenburgh, 7 Id. 141.

[6] Purdy v. Huntington, 42 N. Y. 334; 46 Barb. 389; Westbrook v. Gleason, 79 N. Y. 23; Campbell v. Vedder, 3 Keyes, 174; 1 Abb. App. Dec. 295; Pickett v. Barron, 29 Barb. 505.

SECTION VII.

CONCERNING BONA FIDE PURCHASE FOR A VALUABLE CONSIDERATION AND WITHOUT NOTICE.

ANALYSIS.

§ 735. General meaning and scope of the doctrine.
§ 736. General effect of the recording acts.
§§ 737–744. *First. Rationale* of the doctrine.
§ 738. Its purely equitable origin, nature, and operation.
§ 739. It is not a rule of property or of title.
§§ 740, 741. General extent and limits; kinds of estates protected.
§§ 742, 743. Phillips v. Phillips; formula of Lord Westbury.
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§§ 746–751. I. The Valuable Consideration.
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§ 753. 1. Effects of notice in general.
§ 754. Second purchase *without* notice from first purchaser *with;* also second purchaser *with* from first purchaser *without* notice.
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§§ 771–773. This rule is applied in the United States.
§ 774. Other instances; purchase at execution sale; purchase of things in action.

§§ 775-778. III. Suits by holders of an "equity."
§ 776. For relief against accident or mistake.
§§ 777, 778. For relief from fraud, upon creditors, or between parties.
§§ 779-783. *Fourth.* Affirmative relief to a *bona fide* purchaser.
§ 779. General rule.
§§ 780-782. Illustrations.
§ 783. Removing a cloud from title.
§§ 784, 785. *Fifth.* Mode and form of the defense.
§ 784. The pleadings.
§ 785. Necessary allegations and proofs.

§ 735. **General Meaning, Scope, and Limitations of the Doctrine.**—This section will deal with the equitable doctrine of *bona fide* purchase for a valuable consideration and without notice. The doctrine in its original form was exclusively equitable. Questions of priority can not, as has already been stated, arise between successive adverse estates which are purely legal, and therefore can not, independently of statutory permission, come before courts of law for settlement; such estates must stand or fall upon their own intrinsic merits and validity.[1] A contest concerning priority or precedence properly so called, can only exist where one of the two claimants holds a legal and the other an equitable title, or where both hold equitable titles, and must therefore belong to the original exclusive jurisdiction of equity. Courts of equity do not have jurisdiction of suits brought merely to establish one purely legal title against another and conflicting legal title.[2] In the United States these elementary notions seem to have been sometimes overlooked, and the courts sometimes seem to have extended the doctrine of *bona fide* purchase farther than the acknowledged principles of equity would warrant. The tendency is marked and strong in the courts of many states, even when acting as tribunals of law, to make the doctrine a legal *rule of property*, and to apply it alike to persons who have acquired either a legal or an equitable title to chattels and things in action, as well as to those who have acquired any legal or equitable interest in land. A *subsequent* holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a *subsequent* title was neces-

[1] See *supra*, § 679.

[2] Such suits are often called "ejectment bills." See vol. I, §§ 176-178. Equity has *concurrent* jurisdiction in certain classes of suits dealing with legal titles alone, as suits for dower. In regard to them the doctrine of *bona fide* purchase is applied in a special and peculiar manner.

sarily the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a *bona fide* holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even *bona fide* purchaser.

§ 736. **Effects of the Recording Acts.**—The most extensive and important change, however, in the United States, has been produced by the recording acts. They have extended the doctrine of *bona fide* purchase to all conveyances and mortgages, and often to executory contracts, and to every instrument which can create, transfer, or affect legal estates or equitable interests, liens, and incumbrances, and have therefore brought it within the cognizance of the courts of law as a rule for determining the validity of legal titles. The greatest diversity is found in the statutory provisions of the various states, and a consequent diversity prevails among the local rules which define the resulting rights of the *bona fide* purchaser. In some they are conferred upon judgment creditors, upon all purchasers at execution sales, and even upon those who have secured the first record although charged with notice. It would be impossible, within any reasonable limits, to state all the results of these statutes, and to formulate all the special rules which have been derived from them in the different states. So far as the doctrine of *bona fide* purchase has been made a rule of *law*, either by the operation of the recording acts, or by the independent action of the courts, it does not properly come within the scope of a treatise upon equity jurisprudence. I shall, therefore, explain the principles of the equitable doctrine as established in the United States and in England, and describe the general applications and modifications made necessary by the common American system of registration. The minute effects growing out of the differing types of legislation must be passed over; except so far as they have been mentioned in the foregoing sections upon notice and priorities. The subject will be discussed under the following heads: 1. *Rationale* of the doctrine. 2. What constitutes a *bona fide* purchase. 3. Effects of the doctrine as a defense. 4. Cases in which courts of equity give affirmative relief. 5. How the *bona fide* purchaser must avail himself of his position.

§ 737. **First. Rationale of the Doctrine.**—I purpose to explain, in this division, the essential nature, foundation, and reasons of the doctrine, the general extent and limits of its operation, and the kinds of relief which it furnishes. A correct notion concerning this fundamental theory is necessary to any proper understanding of the practical rules which flow from it. It is sometimes said, in the most unlimited terms, that a purchase, for a valuable consideration and without notice, of any kind of interest, is a defense under all circumstances, which constitutes a complete and absolute bar to every proceeding in which it is sought to establish any species of adverse claim, legal or equitable, or to obtain any species of relief. There are *dicta* of the ablest judges, which taken literally, without limitation, would go far to sustain this view.[1] These citations well show how misleading general statements may be when separated from their context. Such modes of declaring the doctrine, plainly need some limitation and restriction. Taken in their literal and unqualified form they are opposed to conclusions established by an overwhelming weight of judicial authority, and to the settled practice of the courts of equity.

§ 738. **Equitable Origin, Nature, and Operation of the Doctrine.**—The protection given to the *bona fide* purchaser had its origin exclusively in equity, and is based entirely upon the fact that the jurisdiction of equity is ancillary and supplemental to that of the law, and upon the conception that a court of chancery acts solely upon the *conscience* of litigant parties, by compelling the defendant to do what, and only what *in foro conscientiæ* he is bound to do. If the relations between the two

[1] The following are examples of such judicial language: In Att'y-Gen. v. Wilkins, 17 Beav. 285, 293, Lord Romilly said: "My opinion is, that when once you establish that a person is a purchaser for value without notice, this court *will give no assistance against him*, but the right must be enforced at law." In Bowen v. Evans, 1 Jo. & Lat. 178, 264, Chan. Sugden, Lord St. Leonards, said: "In my opinion, whether the purchaser has the legal estate, or only an equitable interest, he may, by way of defense, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title" [*i. e.*, by ejectment]. An earlier and most able chancellor, Lord Northington, said in Stanhope v. Earl Verney, 2 Eden, 81, 85: "A purchaser without notice for a valuable consideration, is a bar to the jurisdiction of the court." Lord Loughborough said in the often quoted case of Jerrard v. Saunders, 2 Ves. 454, 458: "I think it has been decided that against a purchaser for valuable consideration without notice, the court *will not take the least step imaginable.*" In other cases the same judge used more guarded language, in Strode v. Blackburne, 3 Ves. 222. In the celebrated case of Wallwyn v. Lee, 9 Ves. 24, 34, Lord Eldon expressed himself in the following cautious terms: "I am not sure *that* follows as a principle of sound equity; *if the principle of the court is* that against a purchaser for valuable consideration without notice *this court gives no assistance.*"

contestants standing before the court of chancery are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the court will interfere and grant the relief; if the relations are not of this character, then the court will withhold its hand, and will leave the parties to the operation of strict legal rules, and to the remedies conferred by the legal tribunals. All equitable principles and doctrines *had their origin in this conception*, however much it may sometimes be overlooked by courts at present in the administration of the doctrines which have been thus established. The protection given to the *bona fide* purchaser simply means, therefore, that from the relations subsisting between the two parties, especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so, and the parties must be left to their pure legal rights, liabilities, and remedies; the court will not aid either against the other. That this is the true *rationale* is shown by an overwhelming weight of authority.[1] In the vast majority of cases the protection is only given to a defendant, and as a consequence the doctrine itself is commonly spoken of, and ordinarily treated, as essentially a matter of defense. The very few instances in which affirmative relief is granted to the *bona fide* purchaser, are exceptional; they rest upon their special facts, and arise from the fraud of the defendant against whom the relief is awarded.[2]

§ 739. **The Doctrine is not a Rule of Property or of Title.**—In applying the doctrine of *bona fide* purchase—and this is the very *essence* of the doctrine—equity does not intend *to pass upon and decide the merits of the two litigant parties;* it does not decide that the title of the defendant is valid, and

[1] Thus, in Boone v. Chiles, 10 Pet. 177, 210, the supreme court, adopting the language of Lord St. Leonards in his treatise on vendors, said: "A court of equity acts only on the conscience of the party; and if he has done nothing that taints it, no demand can attach upon it so as to give jurisdiction." In the case of Jerrard v. Saunders, 2 Ves. 454, 457, Lord Loughborough said: "Against a purchaser for a valuable consideration this court has no jurisdiction. You *can not attach upon the conscience* of the party any demand whatever, where he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill." I would remark in passing that the expression above, "the court has no jurisdiction," like so many similar modes of statement, is open to criticism. The court certainly *has* jurisdiction in all such cases, since the interest of one, or perhaps of both, of the litigants is equitable. The real meaning is, that the court under these circumstances, and according to its settled principles, *will not exercise its jurisdiction.*

[2] See *infra*, §§ 779–783.

therefore intrinsically the better, and superior to that of the plaintiff. On the contrary, the protection given by way of defense theoretically assumes *that the title of the purchaser is really defective* as against that of his opponent; at all events, the court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, and bases its action upon entirely different considerations.[1] If a plaintiff holding some equitable interest or right, sues to enforce it against a defendant who has in good faith obtained the legal estate, the court simply refuses to interfere and do an unconscientious act by depriving him of the advantage accompanying such an innocent acquisition of the legal title. On the other hand, if the plaintiff is the legal owner, and sues to obtain some equitable relief against a defendant who is the innocent holder of some equitable estate or interest, the court in like manner simply refuses to do an unconscientious act by giving any aid to the plaintiff, but without at all deciding or even examining the intrinsic merits of their claims, leaves him to whatever rights would be recognized and whatever reliefs granted by a court of law. It is thus seen, that the doctrine of *bona fide* purchaser, as administered by equity, *is not in any sense a rule of property*. Whenever the relations between the litigants are of such a nature, and the suit is of such a kind, that a court of equity is called upon to decide, and must decide, the merits of the controversy, and determine the validity and sufficiency of the opposing titles or claims, then it does not admit the defense of *bona fide* purchase as effectual and conclusive. The foregoing

[1] This truth, so fundamental, and yet so often overlooked, was well stated by Lord Eldon in the celebrated case of Wallwyn v. Lee, 9 Ves. 24, 33, 34. The suit was by the holder of the legal title who was in actual possession of the land, and who was seeking discovery and a delivery up of the title-deeds against a mortgagee who set up the defense of *bona fide* purchaser. The chancellor said: "Is it not worth consideration, *whether every plea* of purchase for a valuable consideration without notice *does not admit that the defendant has no title?* If he has a good title, why not discover? I apprehend there is a sufficient ground for saying, a man who has honestly dealt for valuable consideration without notice shall not be called upon, by confessions wrung from his conscience, to say he has missed his object in the extent in which he meant to acquire it." Every one who is familiar with Lord Eldon's judgments knows that it was his invariable practice to express his most settled opinions in the form of inquiries, or suggestions, or suppositions. In another passage, while speaking of the plaintiff's legal rights and the defendant's corresponding legal liabilities, he doubts "whether upon the argument of this plea, the court has any right to discuss that question," and adds: "Is it not worth consideration, whether the very principle of the plea is not this: I have honestly and *bona fide* paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bona fide?*

description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the *subsequent* legal estate acquired by A. in any kind of property or thing in action, merely because he is a *bona fide* purchaser for a valuable consideration without notice, against the prior legal and equally innocent owner B., or even to sustain A.'s defense as a *bona fide* purchaser in a suit brought by B.

§ 740. **General Extent and Limits: Kinds of Estates Protected.**—Such being the *rationale* of the doctrine, it remains to consider the general extent and limits of its operation; and this chiefly involves the question, to what kinds of estates held by the *bona fide* purchaser will it be applied? It has never been doubted that the protection will be extended to the defendant in a suit brought by the holder of a prior equitable estate or interest against the subsequent *bona fide* purchaser of a legal estate, who acquired such estate at the time of and by means of his original purchase.[1] It is also generally extended, in the similar suit by the holder of a prior equitable interest, to a defendant who having originally been the *bona fide* purchaser of a subsequent equity, has afterwards obtained an outstanding legal estate.[2] The vital question is, whether the defense will also avail on behalf of a defendant who has acquired an *equitable* interest merely, against a plaintiff who holds a prior legal estate; and upon this question, dicisions and judicial *dicta*, especially the earlier ones, are in direct conflict. Some cases have expressly held, and *dicta* have stated, that the protection of *bona fide* purchase is confined to defendants who have obtained and hold a legal title, against plaintiffs who have only a prior equitable interest; and that it is never granted where the situation of the parties is reversed, to *bona fide* purchasers of a mere equitable interest defending against relief sought by plaintiffs holding a prior legal estate.[3] It is proper to remark here, although somewhat in anticipation, that there are certain kinds of suits by the holder of a prior legal estate seeking certain special

[1] See *post*, §§ 767, 774, and cases there cited; Demarest v. Wyncoop, 3 Johns. Ch. 129, 147; Varick v. Briggs, 6 Paige, 323; Dickerson v. Tillinghast, 4 Id. 215; Woodruff v. Cook, 2 Edw. Ch. 259; Zollman v. Moore, 21 Gratt. 313; Carter v. Allan, 21 Id. 241; Mundine v. Pitts, 14 Ala. 84; Boyd v. Beck, 29 Id. 703; Wells v. Morrow, 38 Id. 125; Sumner v. Waugh, 56 Ill. 531.

[2] See *post*, §§ 768–773, and cases cited.

[3] Rogers v. Seale, Freem. Ch. Cas. 84, *per* Lord Nottingham; Williams v. Lambe, 3 Bro. Ch. 264, *per* Lord Thurlow; Strode v. Blackburne, 3 Ves. 222, *per* Lord Rosslyn; Collins v. Archer, 1 Russ. & My. 284, *per* Sir John Leach; Snelgrove v. Snelgrove, 4 Desaus. Eq. 274; Blake v. Heyward, 1 Bail. Eq. 208; Brown v. Wood, 6 Rich. Eq. 155; Jenkins v. Bodley, 1 Sm. & Mar. Eq. 338; Wailes v. Cooper, 24 Miss. 208; Larrowe v. Beam, 10 Ohio, 498.

reliefs, in which it is settled that the defendant having only an equitable interest can not rely upon his position as a *bona fide* purchaser, by way of defense.[1] On the other hand, there are numerous cases, early and recent, English and American, in which the defense has been permitted to prevail in favor of one holding a mere equitable interest against a plaintiff suing for some equitable relief upon his legal title, sometimes even when such plaintiff was in possession, and this conclusion must be regarded as settled by the great weight of authority.[2] In some of these cases, the judicial expressions of opinion have been so broad and unlimited, that taken literally they would allow the protection of *bona fide* purchase by way of defense to one having only an equitable interest, in every kind of suit brought to obtain any species of relief, and against any plaintiff whether holding a legal or an equitable estate.[3] Relying upon these

[1] Williams v. Lambe, 3 Bro. Ch. 264, a suit for dower; Collins v. Archer, 1 Russ. & My. 284, a suit concerning tithes.

[2] Basset v. Nosworthy, Rep. temp. Finch, 102; 2 Eq. Lead. Cas. 1; Burlace v. Cooke, Freem. Ch. Cas. 24, *per* Lord Nottingham; Parker v. Blythmore, Prec. Chan. 58, *per* Sir John Trevor, M. R.; Jerrard v. Saunders, 2 Ves. 454, *per* Lord Rosslyn; Wallwyn v. Lee, 9 Id. 24, *per* Lord Elden; Joyce v. De Moleyns, 2 Jo. & Lat. 374, *per* Chan. Sugden; Bowen v. Evans, 1 Id. 178, 264, *per* Chan. Sugden; Finch v. Shaw, 19 Beav. 500, *per* Lord Romilly; Collyer v. Finch, 5 H. L. Cas. 905, *per* Lord Cranworth; Att'y-Gen. v. Wilkins, 17 Beav. 285; Lane v. Jackson, 20 Id. 535; Hope v. Liddell, 21 Id. 183; Penny v. Watts, 1 Macn. & G. 150; Flagg v. Mann, 2 Sumn. 486, *per* Story, J.; Union Canal Co. v. Young, 1 Whart. 410, 431, *per* Rogers, J.; and see *post*, §§ 769–771, and cases cited.

[3] As illustrations, in Joyce v. De Moleyns, 2 Jo. & Lat. 374, Chan. Sugden said: "I apprehend that the purchase for value without notice, *is a shield as well against a legal as an equitable title.* There has been a considerable difference of opinion upon the subject among judges. I have always considered the true rule to be that which I have stated. Therefore, I think that the mere circumstance that this is a legal right, is not a bar to the defense set up, if in other respects it is a good defense. That it is a good defense can not be denied." The same learned judge, in Bowen v. Evans, 1 Id. 178, 264, said: "In my opinion, whether the purchaser has the legal estate or only an equitable interest, he may by way of defense avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title" [*i. e.*, by an action of ejectment]. In Collyer v. Finch, 5 H. L. Cas. 905, 921, Lord Chan. Cranworth said: "The principle on which the court protects a purchaser for valuable consideration without notice, *is wholly regardless of what estate he has.* It may be that he has not the legal estate, but that will be quite unimportant as to a court of equity interfering or refusing to interfere. His equity depends on this, that he stands equitably in at least as favorable a position as his opponent, and therefore the court will not interfere against him." This language, especially of Lord Cranworth, has been relied upon as sustaining the doctrine in the broadest manner, that *bona fide* purchasers of mere equities will always be protected. And yet the Chancellor and House of Lords decided in that very case, that the defendant before them, who held an equitable interest, could not maintain the defense of a *bona fide* purchase against the plaintiff who had the legal estate.

dicta some writers and judges have announced the doctrine in a form wholly unlimited and universal.

§ 741. **Same: When the Doctrine does not Apply.**—Such a method of statement is clearly inaccurate. Notwithstanding the numerous authorities referred to in the preceding paragraph, and the sweeping expressions of judicial opinion, it is certain that the doctrine is subject to limitation; it is settled that in some classes of suits a defendant having only an equitable interest can not be protected by his position as a *bona fide* purchaser. Thus, in an action for foreclosure, brought by a prior legal mortgagee, holding of course the legal estate, against a subsequent equitable mortgagee, the fact that the latter acquired his equitable interest in good faith for a valuable consideration and without notice, is no defense.[1] It is also a well-established and even familiar rule, that in the numerous cases between the holders of successive and equal equities, where the holder of a prior equitable interest is seeking to establish or enforce his right, the defense of *bona fide* purchase will not avail for the holder of a subsequent equity against whom the suit is brought.[2]

§ 742. **Phillips v. Phillips: Formula of Lord Westbury.**—Amidst this apparent conflict and real uncertainty, various judges had attempted to find a mode of reconcilement, and to formulate a rule which should furnish a universal criterion.[3] It remained, however, for Lord Westbury to bring order out of the confusion, and by his remarkable grasp of principles, and wonderful power of generalization, to reduce the doctrine into a universal formula, so accurate and comprehensive that it has been taken by most subsequent text-writers as the basis of their discussions, and has been accepted by sub-

[1] Finch v. Shaw, 19 Beav. 500; affirmed *sub nom.* Colyer v. Finch, 5 H. L. Cas. 905.

[2] Phillips v. Phillips, 4 De G. F. & J. 208, 215, 216, per Lord Westbury. See *ante*, §§ 414 (n.), 682.

[3] For example, in Finch v. Shaw, 19 Beav. 500, Sir John Romilly, M. R., after remarking that there were cases requiring nice distinctions in order to reconcile them, and mentioning in particular Williams v. Lambe, and Collins v. Archer, said: "The distinction I apprehend to be this—if the suit be for the enforcement of a legal claim for the establishment of a legal right, then, although this court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but will leave the parties to the law. If, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy, or an equitable right, *which can only be enforced in this court*, I have not found any case, nor am I aware of any, where this court will refuse to enforce the equitable remedy which is incidental to the legal title." This was applied, as has been stated, to a *legal* mortgagee foreclosing his mortgage against a subsequent *bona fide* equitable mortgagee without notice. The learned Master of Rolls plainly apprehended the true distinction, and came very near to a full and sufficient statement of it.

sequent judges almost without exception.[1] This formula groups the cases in which the protection of a *bona fide* purchaser is given to defendants, into the three following classes. (1) Where an application is made to the *auxiliary* jurisdiction of the court by the possessor of a *legal* title; as against a purchaser for value without notice, a court of equity *gives no assistance to the legal title*. The term "auxiliary jurisdiction" is here used in a sense somewhat broader than that commonly given to it by text-

[1] Phillips v. Phillips, 4 De G. F. & J. 208. Lord Westbury's opinion is so concise as well as clear that I quote that part of it entire which deals with the matters contained in the text. After showing (pp. 215, 216) that the doctrine does not apply as between successive holders of purely equitable estates or interests which are equal in their nature, in the passage quoted *ante*, vol. 1, § 414, n., he proceeds (p. 216): "The defense of a purchaser for valuable consideration is a creature of a court of equity, and it can never be used in any manner in variance with the elementary rules which have already been stated. There appear to be three cases in which the use of this defense is most familiar. *First*, where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title, as by an heir at law for a discovery (which was the case in Bassett v. Nosworthy, Cas. t. Finch, 102), or by a tenant for life for the delivery of title-deeds (which was the case of Wallwyn v. Lee, 9 Ves. 24), and the defendant pleads that he is a *bona fide* purchaser for valuable consideration without notice. In such a case the defense is good, and the reason given is that as against a purchaser for valuable consideration without notice the court gives no assistance—that is, no assistance to the legal title. But this rule does not apply where the court exercises a *legal* jurisdiction concurrently with courts of law. Thus it was decided by Lord Thurlow in Williams v. Lambe, 3 Bro. Ch. 264, that the defense could not be pleaded to a bill for dower; and by Sir John Leach in Collins v. Archer, 1 Russ. & My. 284, that it was no answer to a bill for tithes. In those cases the court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief. *Secondly*. The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts, or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is that a court of equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*. *Thirdly*. Where there are circumstances which give rise to an equity as distinguished from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere." The Chancellor concludes by referring to some recent decisions (p. 219). He does not agree with some remarks of Sir John Romilly in Atty.-Gen. v. Wilkins, 17 Beav. 285, but entirely concurs in and accepts the views as stated by the same judge in Finch v. Shaw, 19 Beav. 500. Lord St. Leonards has dissented from some portions of this celebrated judgment, in a late edition of his work on Vendors. It is proper to say in explanation, and the same observation has often been made, that Lord St. Leonards always appeared extremely unwilling to accept any opinion, or even any decision, which differed from what had been before stated in his treatises, and he exhibited a marked prejudice against certain judges who, like Lord Brougham and Lord Westbury, were distinguished for their advocacy of legal re-

writers. To this first rule there are, however, certain most important exceptions. It does not apply to suits in which the court exercises a *legal* jurisdiction concurrently with courts of law, nor to suits in which the court gives to a holder of the legal title some equitable remedy belonging to its *exclusive general* jurisdiction. (2) Where the plaintiff holding an *equitable* estate or interest is seeking to enforce it against a purchaser of the legal title, including those cases where there are several successive purchasers or incumbrancers, all equitable, and the defendant who is later in time has obtained an outstanding legal estate, or some other legal advantage, often called the "*tabula in naufragio.*" (3) Where the plaintiff is seeking to enforce some "equity" as distinguished from an equitable estate, as the reformation of a deed on account of mistake, or the setting it aside on the ground of fraud.

§ 743. **Summary of Conclusions.**—The following conclusions must be drawn from the foregoing discussion. Wherever one or the other of the parties has a legal estate over which a court of law can exercise jurisdiction, then in an equity suit between them, as a general rule, the defense of a *bona fide* purchase for valuable consideration will avail as against the plaintiff whether he has a legal or an equitable estate, in either case the court of equity simply withholding its hand and remitting the parties to a court of law. If the plaintiff has a legal estate, he is left to the remedies which a court of law can give, without any aid from equity; if the defendant has a legal estate, the court does not deprive him, even as against a plaintiff clothed with an equitable interest, of the advantage which the

forms. I will add that the exception so distinctly made by Lord Westbury of successive holders of purely equitable interests which are equal in their nature, is most clearly in harmony with the elementary principles and maxims of equity. If the legal owner of land has executed a contract for its sale and conveyance to A., who has paid the stipulated price, and he afterwards gives a similar contract to B., who takes it and pays the price in full without any notice of the prior agreement, there is no reason why B. should be preferred to A. and should be allowed to compel a conveyance to himself. On the contrary, between two such equal claimants, A.'s priority in time clearly gives him a priority of right. See Peabody v. Fenton, 3 Barb. Ch. 451, 464. The same would be true of successive mortgages given on the same land to different mortgagees, if they were regarded as creating equitable interests only, and there was no recording statute to modify the application of equitable doctrines. Where both mortgagees were equally meritorious, each having advanced money, the first of course without any notice of the second, and the second without any notice of the first, the second would not obtain any *intrinsic* superiority to the first, and consequently the maxim would control, and the priority in time would turn the scale in equity as well as it would at law between successive legal interests. These examples will serve to explain a principle which has been fully discussed in the preceding section.

law confers upon the holder of such estate, and which it secures through the instrumentality of a legal tribunal. If the suit concerns legal interests, and is one of which a court of equity has jurisdiction concurrently with the courts of law, the defense will not prevail. For even stronger reasons must this be true, where the suit belongs to the *exclusive general* jurisdiction of equity, and not only is the defendant's interest equitable, but the plaintiff's right or remedy is also equitable, and must be administered, if at all, by a court of equity. Bearing in mind that, independently of statute, the doctrine of protection to a *bona fide* purchaser is confined to courts of equity, and the most important truth that it is *in no respect a rule of property*, but merely *a rule of inaction*, these conclusions are seen to be equally plain and just. In the first-mentioned class of cases, where equity has concurrent jurisdiction, the defense is not allowed, for otherwise the parties would be put to unnecessary delay and expense, since the plaintiff would be driven to a second action at law in which he would, of course, obtain the relief. In the second class of cases, where equity has an exclusive jurisdiction, to allow the defense would simply be a complete denial of justice, since no other tribunal could adjudicate upon the conflicting claims, and the plaintiff might thus be deprived of prior and vested rights without any act or default on his own part.[1]

§ 744. The explanation, which I have thus endeavored to give of the true theory of the doctrine concerning *bona fide* purchase, seemed to be necessary to any accurate understanding of its applications and effects. This original equitable theory has, however, been modified in some important features, by the statutory system of registration which prevails in all the American states. Before proceeding to describe the applications and effects of the doctrine, it is proper to ascertain who the *bona fide* purchaser for valuable consideration is.

§ 745. **Second. What Constitutes a Bona Fide Purchase.**—Under this head I shall state those essential elements which enter into the equitable conception, and determine the peculiar position, of a *bona fide* purchaser, so that he may come within the operation of the doctrine. The nature of the thing purchased, whether land, chattels, or securities, and of the estate acquired, whether absolute or qualified, legal or equitable, is not a part of *this* conception; it belongs wholly to the effects—

[1] See 2 Eq. Lead. Cas., p. 22 (4th Am. ed.), notes to Bassett v. Nosworthy, where these conclusions are fully adopted by the English editor.

the protection—produced by the purchase. The doctrine in its most general form is, that a purchaser in good faith for a valuable consideration and without notice of the prior adverse claims, is protected against certain suits brought by the holders of such claims.[1] The essential elements which constitute a *bona fide* purchase are therefore three—a valuable consideration, the absence of notice, and the presence of good faith. It will be practically the more convenient and advantageous to examine these three elements separately, and in the order named; although in strict theory the presence of notice may perhaps be regarded as only an indication of the want of good faith. If a person goes on and purchases after notice of another's rights, he may be considered as acting in bad faith, and this is undoubtedly the basis upon which the whole doctrine of notice and its effects was rested by the early decisions.[2] Practically, however, notice, especially as affected by the recording acts, is an independent element, and should be discussed by itself.

§ 746. **I. The Valuable Consideration.**—The discussion of this subject involves two inquiries, which are entirely distinct, and which should not be confounded: (1) What is a valuable consideration? and (2) Its payment? These two questions are to be examined, not at all in their general and abstract meaning, but wholly as they affect the condition of a *bona fide* purchaser. The first has no relation to the general law of contracts and binding promises; the second, in like manner, deals with the act and time of payment only in connection with the doctrine of *bona fide* purchase.

§ 747. **1. What is Valuable Consideration.**—What constitutes a valuable consideration within the meaning of the doctrine which gives protection to a *bona fide* purchaser? No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a *bona fide* purchaser.[3] Valuable consideration means, and necessarily requires under

[1] For a statement of what constitutes a *bona fide* purchase in general, see Willoughby v. Willoughby, 1 T. R. 763, 767, *per* Lord Hardwicke; also *ante*, vol. 1, cases cited in notes under § 200; Basset v. Nosworthy, 2 Eq. Lead. Cas., pp. 33–42, 73, 74, 75–96 (4th Am. ed.); Kinney v. Consolidated etc. Min. Co., 4 Sawy. 382; Hardin v. Harrington, 11 Bush, 367; Briscoe v. Ashby, 24 Gratt. 454; Hamman v. Keigwin, 39 Tex. 34.

[2] See *ante*, § 592.

[3] Roseman v. Miller, 84 Ill. 297; Bowen v. Prout, 52 Id. 354 (inheritance); Everts v. Agnes, 4 Wisc. 343; Upshaw v. Hargrove, 6 Sm. & Mar. 286, 292; Boon v. Barnes, 23 Miss. 136; Swan v. Ligan, 1 McCord Eq. 227; Patten v. Moore, 32 N. H. 382; Frost v. Beekman, 1 Johns. Ch. 288; Aubuchon v. Bender, 44 Mo. 560; Bishop v. Schneider, 46 Id. 472.

every form and kind of purchase, something of actual value, capable in estimation of the law of pecuniary measurement, parting with money or money's worth, or an actual change of the purchaser's legal position for the worse.[1] The amount of the purchase, if otherwise in good faith, is not generally material.[2] As examples of what clearly amount to valuable consideration are the following: A contemporaneous advance or loan of money, or a sale, transfer, or exchange of property, made at the time of the purchase, or execution of the instrument;[3] the surrender or relinquishment of an existing legal right, or the assumption of a new legal obligation which is in its nature irrevocable.[4] Whether this species of valuable consid-

[1] Idem; Tourville v. Naish, 3 P. Wms. 306; Story v. Lord Windsor, 2 Atk. 630; Hardingham v. Nicholls, 3 Id. 304; Webster v. Van Steenbergh, 46 Barb. 211; Pickett v. Barron, 29 Id. 505; Dickerson v. Tillinghast, 4 Paige, 215; Penfield v. Dunbar, 64 Barb. 239; Weaver v. Barden, 49 N. Y. 286; Delancey v. Stearns, 66 Id. 157; Westbrook v. Gleason, 79 Id. 23, 28; Williams v. Shelly, 37 Id. 375; Lawrence v. Clark, 36 Id. 128; Reed v. Gannon, 3 Daly, 414; Munn v. McDonald, 10 Watts, 270; Union Canal Co. v. Young, 1 Whart. 410, 432; Roxborough v. Messick, 6 Ohio St. 448; Palmer v. Williams, 24 Mich. 328; Brown v. Welch, 18 Ill. 343; Keys v. Test, 33 Id. 316; McLeod v. Nat. B'k, 42 Miss. 99; Haughwout v. Murphy, 21 N. J. Eq. (6 C. E. Green), 118; Aubochon v. Bender, 44 Mo. 560; Spurlock v. Sullivan, 36 Tex. 511.

[2] If there is an actual value, properly paid, the amount is not material if the transaction is otherwise in good faith. Wood v. Chapin, 13 N. Y. 509; Cary v. White, 52 Id. 138, 142; Pickett v. Barron, 29 Barb. 505; Seward v. Jackson, 8 Cow. 406, 430; Westbrook v. Gleason, 79 N. Y. 23, 36, *per* Rapallo, J.

The amount if grossly small and inadequate would not be a valuable consideration so as to protect the purchaser, because it would show bad faith. Worthy v. Caddell, 76 N. C. 82. It has been held that paying a purchase price in confederate money was not valuable consideration within the rule. Sutton v. Sutton, 39 Tex. 549; Willis v. Johnson, 38 Id. 303.

[3] Gerson v. Pool, 31 Ark. 85 (loaning money on the security of a trust deed); Bowen v. Prout, 52 Ill. 354 (exchange of lands); Munn v. McDonald, 10 Watts, 270; Martin v. Jackson, 3 Casey, 504, 509; Roxborough v. Messick, 6 Ohio St. 448; Keirsted v. Avery, 4 Paige, 9; Conard v. Atlantic Ins. Co., 1 Pet. 386. And where the price of a conveyance consisted in part of money actually paid, and the residue of antecedent debt satisfied, the whole has been held to constitute a valuable consideration. Curtis v. Leavitt, 15 N. Y. 11, 179; Glidden v. Hunt, 24 Pick. 221; Baggarly v. Gaither, 2 Jones Eq. 80.

[4] In Westbrook v. Gleason, 79 N. Y. 23, 36, a vendee under a land contract was in open possession, having made improvements. While he was thus in possession a mortgage was given upon the land by his vendor which was unrecorded. Afterwards, and before this mortgage was recorded, he took a deed of conveyance of the land from his vendor and gave back a bond and mortgage to secure the whole price. This deed he put on record before the first-named mortgage was recorded. The only question was whether he could claim the benefit of his earliest record, by being a purchaser for a valuable consideration, although he had not paid any of the price. The court said, "that if by accepting the deed he parted with his equitable title to the land, which had precedence of the plaintiff's mortgage [and thereby lost the priority], and with his right to the improvements, etc., then he was, within all the cases, a purchaser for value." See Williams v. Shelly, 37 N. Y. 375; Reed v. Gannon, 3 Daly, 414; McLeod v. Nat. Bank, 42 Miss. 99; for examples of giving up or canceling a

eration embraces the discharge, or the extension of the time of payment, of an antecedent debt, is a question upon which the authorities are conflicting, and its examination is postponed to the succeeding paragraphs. In general, however, it is requisite that the money be paid or advanced, the property transferred, the right surrendered, or the obligation assumed, at the time of the conveyance, and as a part of the transaction, in order that it may be the valuable consideration which can protect the purchaser.

§ 748. **Antecedent Debts.**—Whether an antecedent debt can *ever* be a valuable consideration has been denied by able courts; but this general subject has been further complicated by the various modes in which such a debt may be dealt with—secured, discharged, postponed, and the like—and the various questions thence arising which have caused the greatest conflict of judicial opinion. In very many, and perhaps a majority of the states, it is settled that the transferee of negotiable paper as security for an antecedent debt, may be a *bona fide* holder by the law merchant; but this rule can not be a precedent in determining the meaning of valuable consideration within the equitable doctrine of *bona fide* purchase.[1]

§ 749. **Security for or Satisfaction of an Antecedent Debt.**—A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a *bona fide* purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the states, that such a transfer is not made upon a valuable consideration, within the meaning of the doctrine of *bona fide* purchase.[2] In some states, on the con-

security, see Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' Bank, 25 Id. 143; Padgett v. Lawrence, 10 Paige, 170; Struthers v. Kendall, 5 Wright, 214, 218; Goodman v. Simonds, 20 How. (U. S.) 343, 371.

[1] The rule concerning the transfer of negotiable instruments has been thus settled, avowedly in the interests of commerce and mercantile business; these reasons do not apply to the purchase of land and chattels and non-negotiable securities. In some of the states, therefore, where it has been applied to negotiable paper, it has been rejected with respect to other conveyances and transfers.

[2] Alexander v. Caldwell, 55 Ala. 517 (mortgage for a pre-existing debt); Short v. Battle, 52 Id. 456; Gafford v. Stearns, 51 Id. 434; Johnson v. Graves, 27 Ark. 557; Cary v. White, 52 N. Y. 138; Hart v. The Bank, 33 Vt. 252; Poor v. Woodburn, 25 Id. 235; Hodgeden v. Hubbard, 18 Id. 504; Clark v. Flint, 22 Pick. 231; Buffington v. Gerrish, 15 Mass. 156; Mingus v. Condit, 23 N. J. Eq. (8 C. E. Green), 313; Wheeler v. Kirtland, 24 Id. 552; Ashton's Appeal, 73 Pa. St. (23 P. F. Sm.) 153, 162; Garrard v. Pittsburgh etc. R. R., 5 Casey, 154, 159; Prentice v. Zane, 2 Gratt. 262; Halstead v. B'k of K'y, 4 J. J. Marsh. 554; Manning v. McClure, 36 Ill. 490; Boon v. Barnes, 23 Miss. 136;

trary, even the securing a pre-existing debt is held to be a valuable consideration.[1] Whether the complete satisfaction or discharge, or the definite forbearance of an antecedent debt, without the surrender or cancellation of any written security by the creditor, will be a valuable consideration, is a question to which the courts of different states have given conflicting answers; but the affirmative seems to be supported by the numerical weight of authority.[2] Some legal rules ought to be settled in accordance with the results of experience and the dictates of policy, rather than by a compliance with the deductions of a strict logic. To hold that a conveyance as *security* for an antecedent debt is made without, but that one in *satisfaction* of such a debt is made with a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends upon mere verbal testimony, is opening the door wide for the easy admission of fraud. It leaves the rights of third persons to depend upon the coloring given to a past transaction by the verbal testimony of witnesses, after the event has disclosed to the creditor the form and nature in which it is

Upshaw v. Hargrove, 6 Sm. & Mar. 286, 292; Haynsworth v. Bischoff, 6 Rich. 159; Spurlock v. Sullivan, 36 Tex. 511; Pancoast v. Duval, 26 N. J. Eq. 445; Van Heusen v. Radcliff, 17 N. Y. 580; Weaver v. Barden, 49 Id. 286; Manhattan Co. v. Evertson, 6 Paige, 457; Padgett v. Lawrence, 10 Id. 170; Dickerson v. Tillinghast, 4 Id. 215; Zorn v. R. R. Co., 5 S. C. 90; Morse v. Godfrey, 3 Story, 364, 389; Metrop. B'k v. Godfrey, 23 Ill. 579; but see Doolittle v. Cook, 75 Id. 354.

[1] Babcock v. Jordan, 24 Ind. 14; Frey v. Clifford, 44 Cal. 335.

[2] Satisfaction and discharge merely of an antecedent debt is a valuable consideration. Soule v. Shotwell, 52 Miss. 236 (the settled rule in Mississippi); Ruth v. Ford, 9 Kans. 17; Love v. Taylor, 26 Miss. 567; Saffold v. Wade's Ex'r, 51 Ala. 214; Ohio Life Ins. etc. Co. v. Ledyard, 8 Ala. 866; The Bank v. Godfrey, 23 Ill. 579, 606; Donaldson v. B'k of Cape Fear, 1 Dev. Eq. 103. Whether, and how far, a definite forbearance, or agreement to extend the time of payment of an antecedent debt, for a definite time, is a sufficient consideration within the doctrine, see cases last cited, and also Atkinson v. Brooks, 26 Vt. 569; Griswold v. Davis, 31 Id. 390, 394; Railroad Co. v. Barker, 5 Casey, 160, 162; Lonsdale v. Brown, 4 Wash. C. C. 148, 151. It has been decided in New York that extending time by a valid agreement is a valuable consideration sufficient to support a mortgage; but that the mere taking collateral security on time without any additional agreement is not. Cary v. White, 52 N. Y. 138, reversing 7 Lans. 1, and disapproving of dictum in Pratt v. Coman, 37 N. Y. 440; see also Wood v. Robinson, 22 Id. 564; see, also, on the effect of satisfaction or giving time, Van Heusen v. Radcliff, 17 N. Y. 580; Lawrence v. Clark, 36 Id. 128; Dickerson v. Tillinghast, 4 Paige, 215; Evertson v. Evertson, 5 Id. 644; Bay v. Coddington, 20 Johns. 637; 5 Johns. Ch. 54; Mingus v. Condit, 23 N. J. Eq. (8 C. E. Green), 313; Pancoast v. Duval, 26 Id. (11 Id.) 445; Ingram v. Morgan, 4 Humph. 66; Wormley v. Lowry, 1 Id. 468; Clark v. Flint, 22 Pick. 231; Sargent v. Sturm, 22 Cal. 359. If, however, the creditor actually surrenders up or cancels some written security, such act becomes a valuable consideration, and makes him a *bona fide* purchaser. Youngs v. Lee, 12 N. Y. 551; Meads v. Merchants' B'k, 25 Id. 143; Padgett v. Lawrence, 10 Paige, 170; Struthers v. Kendall, 5 Wright, 214, 218; Goodman v. Simonds, 20 How. (U. S.) 343, 371; and see Thompson v. Blanchard, 4 N. Y. 303; Penfield v. Dunbar, 64 Barb. 239.

for his interest to picture the transaction. A rule which renders it so easy for an interested party to defeat the rights of others, is clearly impolitic. It sometimes happens that rules, which are the most logically correct, are the ones which most readily admit the possibility of fraud and injustice. It is very generally settled, in accordance with principle, that an assignment made by a debtor in trust for the benefit of his creditors, is not a conveyance upon valuable consideration, and neither the assignee nor the creditors thereby become *bona fide* purchasers.[1] The questions concerning judgment creditors and purchasers at execution sales upon judgments, have already been examined in the preceding section.[2]

§ 750. **2. Payment of the Consideration.**—Not only must there be a valuable consideration in fact, but it must be paid before notice of the prior claim. Notice after the agreement for the purchase is made, but before any payment, will destroy the character of *bona fide* purchaser.[3] The rule is settled in England that the entire price or consideration must have been paid before any notice, and the same completeness of payment is required by some American decisions.[4] Since the modes of transferring and dealing with real property in this country are so different from those which prevail in England, the same equitable principles which guided the English judges have led the courts in many of the states, under a change of circumstances, to adopt a necessary modification of this rule; otherwise great injustice might be wrought. These courts have held that where a part only of the price or consideration has been paid before notice, either the defendant should be entitled to the position and protection of a *bona fide* purchaser *pro tanto;* or that the plaintiff should be permitted to enforce his claim to the whole land only upon condition of his doing equity by re-

[1] Clark v. Flint, 22 Pick. 231; Holland v. Cruft, 20 Id. 321; Griffin v. Marquardt, 17 N. Y. 28; Van Heusen v. Radcliff, 17 Id. 580; Joslin v. Cowee, 60 Barb. 48; Haggerty v. Palmer, 6 Johns. Ch. 437; Mellon's Appeal, 8 Casey, 121; Spackman v. Ott, 65 Pa. St. (15 P. F. Sm.) 131; *In re* Fulton's Estate, 51 Id. (1 Id.) 204, 211; Twelves v. Williams, 3 Whart. 485; Ludwig v. Highley, 5 Barr. 132, 140; Willis v. Henderson, 4 Scam. 13.

[2] See *supra*, §§ 721–724.

[3] Hardingham v. Nicholls, 3 Atk. 304; Maitland v. Wilson, 3 Id. 814; Molony v. Kernan, 2 Dr. & War. 31; Wood v. Mann, 1 Sumn. 506, 578; Flagg v. Mann, 2 Id. 486; Penfield v. Dunbar, 64 Barb. 239; Palmer v. Williams, 24 Mich. 328; Kitteridge v. Chapman, 36 Iowa, 348; Baldwin v. Sager, 70 Ill. 503. See further, *supra*, § 691.

[4] See cases in last note; also, Tourville v. Naish, 3 P. Wms. 307; Story v. Lord Windsor, 2 Atk. 630; More v. Mayhow, 1 Chan. Cas. 34; Wood v. Mann, 1 Sumn. 506, 578; Flagg v. Mann, 2 Id. 486; Jewett v. Palmer, 7 Johns. Ch. 65; Losey v. Simpson, 3 Stockt. Ch. 246.

funding to the defendant the amount already paid before receiving the notice; or even, when the plaintiff has been guilty of laches, or the defendant has perhaps made valuable improvements, that the land itself should remain free from any claim on the plaintiff's part, and his remedy should be confined to a recovery of the portion of purchase money which was still unpaid when notice was given.[1]

§ 751. **Payment must be Actual.**—It is further settled that there must be *actual payment* before any notice, or what in law is tantamount to actual payment—a transfer of property or things in action, or an absolute change of the purchaser's legal position for the worse, or the assumption by him of some new irrevocable legal obligation. It follows, therefore, that his own promise, contract, bond, covenant, bond and mortgage, or other non-negotiable security for the price, will not render the party a *bona fide* purchaser, nor entitle him to protection; for upon failure of the consideration he can be relieved from such obligations in equity even if not at law.[2] Payment of actual

[1] In many of the cases where this American rule has been applied, the land was contracted to be sold by its owner to a first vendee, A., who did not take possession, and was afterwards contracted to be sold to a second vendee, B., who took possession, made improvements, and paid a part of the price before notice of A.'s right, and who took a deed from his vendor after such notice. If A. had delayed in enforcing his rights, and especially if he had neglected to record his contract in states where he was permitted by statute so to do, the equities of the second vendee B. have been regarded by the courts as very strong, even if not absolutely the superior. Baldwin v. Sager, 70 Ill. 503 (where a part of the price has been paid before notice of a prior lien, such lien can be enforced to the extent of the unpaid portion); Kitteridge v. Chapman, 36 Iowa, 348 (protection *pro tanto*); Haughwout v. Murphy, 21 N. J. Eq. (6 C. E. Green), 118; Paul v. Fulton, 25 Mo. 156; Fraim v. Frederick, 32 Tex. 294; Frost v. Beekman, 1 Johns. Ch. 288; Farmers' Loan Co. v. Maltby, 8 Paige, 361; Doswell v. Buchanan's Ex'rs, 3 Leigh, 365; Everts v. Agnes, 4 Wisc. 343; Youst v. Martin, 3 Serg. & R. 423; Union etc. Co. v. Young, 1 Whart. 410, 431; Juvenal v. Jackson, 2 Harris, 519, 524; Beck v. Uhrich, 1 Id. 636, 639; 4 Id. 499; Kunkle v. Wolfersberger, 6 Watts, 126; Bellas v. McCarty, 10 Id. 13; Boggs v. Varner, 6 Watts & S. 469, 472; Dufphey v. Frenaye, 5 Stew. & Port. 215. In Haughwout v. Murphy, *supra*, the court, while recognizing the general rule that a purchaser claiming to be *bona fide* must have paid the full price before notice, held that a plaintiff, who by his own laches had misled the purchaser, would not be permitted to enforce this rule, but would be confined to a recovery of the price which remained unpaid when notice of his claim was received. In Youst v. Martin, *supra*, the reasons of the American modification are clearly stated by Tilghman, C. J.

[2] See English cases cited under last paragraph. Roseman v. Miller, 84 Ill. 297; Kitteridge v. Chapman, 36 Iowa, 348; Hutchins v. Chapman, 37 Tex. 612; Spicer v. Waters, 65 Barb. 227; Haughwout v. Murphy, 21 N. J. Eq. (6 C. E. Green), 118; Dickerson v. Tillinghast, 4 Paige, 215; Ells v. Tousley, 1 Id. 280; Whittick v. Kane, 1 Id. 200, 208; Jewett v. Palmer, 7 Johns. Ch. 64, 68; De Mott v. Starkey, 3 Barb. Ch. 403; Webster v. Van Steenbergh, 46 Barb. 211; Weaver v. Barden, 49 N. Y. 286; Cary v. White, 52 Id. 138; Delancey v. Stearns, 66 Id. 157; Westbrook v. Gleason, 70 Id. 23, 28; Beck v. Uhrich, 1 Harris, 636, 639; 4 Id. 499; Kunkle v. Wolfersberger, 6 Watts, 126.

cash, however, is not indispensable. The assumption of an irrevocable obligation, from which the purchaser could not be relieved even by a failure of the consideration arising from the title being invalid, may be sufficient.[1] The absolute transfer of notes, bonds, or other securities made by a third person, will have the same effect.[2]

§ 752. **Absence of Notice.**—The nature of notice, its various forms, and its general effects have been considered in the preceding sections. The present inquiry only concerns its special effects upon a *bona fide* purchase, the time when it must be received in order that these effects may be produced, and the modifications and additions introduced by the recording acts. Since the doctrine of *bona fide* purchase requires the absence of notice—a purchase for a valuable consideration and without notice—the discussion of this negative element must chiefly consist of an affirmative statement of the consequences flowing from the presence of notice.

§ 753. **1. Effects of Notice.**—The rule is universal and elementary, that if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interests under the purchase, his position as *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration; on the other hand, notice given after his interests have been completely acquired or perfected, produces no injurious effect.[3] Notice sufficient to prevent the purchase from being

[1] There are many forms of such obligation. (1) One of this occurs where the purchaser has given his own negotiable notes for the whole or a part of the price. Some of the cases seem to require that the note so given to the vendor should have been actually negotiated by him so as to cut off the maker's defense of a failure of the consideration; by others, it seems to be sufficient that such notes are given by the purchaser to the vendor, so that they *may* be negotiated and the defense cut off. Baldwin v. Sager, 70 Ill. 503 (notes given and negotiated); Partridge v. Chapman, 81 Ill. 137 (note given for a part of the price and negotiated by the payee); Williams v. Beard, 1 S. C. 309 (a note of a third person guaranteed by the purchaser, given for a part of the price); Freeman v. Deming, 3 Sandf. Ch. 327; Frost v. Beekman, 1 Johns. Ch. 288. (2) Another form would be the undertaking by the purchaser to pay a debt due from the vendor to a third person, in such a manner that he was absolutely substituted as the debtor in the place of his vendor. Jackson v. Winslow, 9 Cow. 13; Frost v. Beekman, *supra*.

[2] Williams v. Beard, 1 S. C. 309; Murray v. Ballou, 1 Johns. Ch. 566; Heatley v. Finster, 2 Id. 159; Jewett v. Palmer, 7 Id. 64; Christie v. Bishop, 1 Barb. Ch. 105; Harris v. Norton, 16 Barb. 264; Patten v. Moore, 32 N. H. 382; High v. Batte, 10 Yerg. 186; McBee v. Loftis, 1 Strobh. Eq. 90.

[3] See cases cited *ante*, vol. 1, under § 200; also, under § 740. Virgin v. Wingfield, 54 Ga. 451; Hardin v. Harrington, 11 Bush, 367; Hull v. Swarthout, 29 Mich. 249 (when a purchaser is not bound to make inquiries from his own vendor); Hamman v. Keigwin, 39 Tex. 34; Batts v. Scott, 37 Tex. 59 (in Texas, under the re-

bona fide, may inhere in the very form and kind of the conveyance itself. On this ground it is held by one group of authorities that a grantee *taking* or *holding* under a *quitclaim* deed can not be a *bona fide* purchaser; but this conclusion is rejected by other decisions.[1]

§ 754. **Second Purchaser without Notice from First Purchaser with Notice: Second Purchaser with Notice from First Purchaser without.**—There are two special rules on the subject which have been settled since an early day, one being a mere application of the general doctrine, and the other, a necessary inference from it. The first is, that if a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a *bona fide* purchaser, and is entitled to protection. This statement may be generalized. If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition.[2] This exception is, that such a title can not be

cording acts one who intentionally purchases an equitable title may be a *bona fide* purchaser, as much as one who purchases the legal estate); Kearney v. Vaughan, 50 Mo. 284 (information obtained by a grantee from his own grantor); Hoyt v. Jones, 31 Wisc. 389; Wormley v. Wormley, 8 Wheat. 421; Frost v. Beekman, 1 Johns. Ch. 288; Murray v. Finster, 2 Id. 155; Losey v. Simpson, 3 Stockt. Eq. 246; Beck v. Ulrich, 1 Harris, 636; Jewett v. Palmer, 7 Johns. Ch. 64.

[1] Cases which hold that a grantee taking or deriving title under a quitclaim deed can not be *bona fide* purchasers; that such a deed is *ipso facto* notice of all defects in the title: Munn v. Best, 62 Mo. 491; Kearney v. Vaughn, 50 Mo. 284; Ridgeway v. Holliday, 59 Id. 444; Oliver v. Piatt, 3 How. (U. S.) 333; May v. Le Claire, 11 Wall. 217; Bragg v. Paulk, 42 Me. 502; Smith v. Dutton, 42 Iowa, 48; Watson v. Phelps, 40 Id. 482. Cases which hold the contrary, viz., that there is no difference between holding a quitclaim deed and any other species of conveyance: Chapman v. Sims, 53 Miss. 154; Corbin v. Sullivan, 47 Ind. 356; and see Hutchinson v. Harttmann, 15 Kans. 133. Cases involving the more general rule that the form of conveyance, or the nature of the interest acquired, may *ipso facto* be notice: Bertram v. Cook, 32 Mich. 518 (assignee of the vendee in a land contract); Stout v. Hyatt, 13 Kans. 232 (purchaser of a mere equitable title); Edmonds v. Torrence, 48 Ala. 38 (assignee from vendee under a land contract); Lewis v. Boskins, 27 Ark. 61, and Peay v. Capps, 27 Id. 160 (vendee in possession under a land contract, buying a better title than his vendors, can not become thereby a *bona fide* purchaser as against his vendor); McNary v. Southworth, 58 Ill. 473 (where a trustee purchased at his own trust sale, a remote purchaser deriving title under him may be a *bona fide* purchaser.) In Conover v. Van Mater, 18 N. J. Eq. (3 C. E. Green), 481, it was held that the assignee of a mortgage, even without notice, takes it subject to all equities, it being only a *chose in action* and a mere equitable lien. The contrary is held in Massachusetts, where the mortgage creates a true legal estate. Welch v. Priest, 8 Allen, 165.

[2] Paris v. Lewis, 85 Ill. 597; Hardin v. Harrington, 11 Bush, 367; Pringle v. Dunn, 37 Wisc. 449; Price v. Martin, 46 Miss. 489; Demarest v. Wynkoop, 3 Johns. Ch. 129, 147; Varick v.

conveyed, free from the prior equities, back to a former owner who was charged with notice. If A. holding a title affected with notice, conveys to B., a *bona fide* purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the land in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also *good faith*.[1] The second rule is, that if a second purchaser with notice acquires title from a first purchaser who was without notice, and *bona fide*, he succeeds to all the rights of his immediate grantor. In fact, when land once comes, freed from equities, into the hands of a *bona fide* purchaser, he obtains a complete *jus disponendi*, with the exception last above mentioned, and may transfer a perfect title even to volunteers.[2]

Briggs, 6 Paige, 323; Glidden v. Hunt, 24 Pick. 221; Tompkins v. Powell, 6 Leigh, 576.

The same rule applies under the recording acts. If A., without notice of a prior unrecorded deed or incumbrance, purchases from B. who had notice, his title is free, and may be made perfect by an earlier record. See Varick v. Briggs, *supra;* Jackson v. Valkenburgh, 8 Cow. 260; Knox v. Silloway, 10 Me. 201, 221; Connecticut v. Bradish, 14 Mass. 296; Fallass v. Pierce, 30 Wisc. 443; Mallory v. Stodder, 6 Ala. 801; Truluck v. Peeples, 3 Kelly, 446.

For the same reason a purchaser for value and without notice from a vendor who had himself acquired his title through fraud, becomes *bona fide* free from the effects of the fraud. Wood v. Mann, 1 Sumn. 506; Galatian v. Erwin, Hopk. Ch. 48; Somes v. Brewer, 2 Pick. 184; see *post*, § 777.

[1] Kennedy v. Daly, 1 Sch. & Lef. 355, 379; Bumpus v. Platner, 1 Johns. Ch. 213, 219; Schutt v. Large, 6 Barb. 373; Ashton's Appeal, 73 Pa. St. (23 P. F. Sm.), 153; Church v. Ruland, 64 Id. (14 Id.) 432, 444; Church v. Church, 1 Casey, 278; Troy City B'k v. Wilcox, 24 Wisc. 671.

[2] Allison v. Hagan, 12 Nev. 38; Pringle v. Dunn, 37 Wisc. 449; McShirley v. Birt, 44 Ind. 382; Moore v. Curry, 36 Tex. 668; Fletcher v. Peck, 6 Cranch, 87; Alexander v. Pendleton, 8 Id. 462; Vattier v. Hinde, 7 Pet. 252; Boone v. Chiles, 10 Id. 177; Bumpus v. Platner, 1 Johns. Ch. 213; Demarest v. Wynkoop, 3 Id. 129, 147; Galatian v. Erwin, Hopk. Ch. 48; Varick v. Briggs, 6 Paige, 323, 329; Griffith v. Griffith, 9 Id. 315, Webster v. Van Steenbergh, 46 Barb. 211; Dana v. Newhall, 13 Mass. 498; Trull v. Bigelow, 16 Id. 406; Boynton v. Rees, 8 Pick. 329; Rutgers v. Kingsland, 3 Halst. Ch. 178, 658; Holmes v. Stout, 3 Green Ch. 492; Bracken v. Miller, 4 Watts & S. 102; Mott v. Clark, 9 Barr. 399; Church v. Church, 1 Casey, 278; Filby v. Miller, 1 Id. 264; Curtis v. Lunn, 6 Munf. 42; Lacy v. Wilson, 4 Id. 313; City Council v. Page, Speer's Eq. 159; Lindsey v. Rankin, 4 Bibb, 482; Halstead v. B'k of K'y, 4 J. J. Marsh. 554; Blight's Heirs v. Banks, 6 Mon. 192, 198.

The rule was first settled in the early case of Harrison v. Forth, Prec. Chan. 51, and followed in Brandlyn v. Ord. 1 Atk. 571; Lowther v. Carlton, 2 Id. 242; Sweet v. Southcote, 2 Bro. Ch. 66; Ferrars v. Cherry, 2 Vern. 383; McQueen v. Farquhar, 11 Ves. 467, 477. Like the first rule it also applies to cases of unrecorded instruments under the recording acts. Webster v. Van Steenbergh; Lacy v. Wilson, Mott v. Clark; Boynton v. Rees, *supra*.

The rule, however, will not apply under special circumstances where its enforcement would violate other settled doctrines. In Johns v. Sewell, 33 Ind. 1, a second purchaser B. bought with notice from a first purchaser A., who had acquired without notice; but since A. was a mere volunteer and therefore did not hold the land free from equities, B. took it subject to the same equities. In Blatchley v. Osborn, 33 Conn. 226, it was held that a tenant in common with notice can not get a clear title from his co-tenant without notice by partition.

§ 755. **2. Time of Giving Notice.**—We have seen that if notice is not given until after the purchaser has fully paid the consideration, received a conveyance, and completed his title, he is not in the least affected by it. If the notice is given before any or all of these steps have been taken, its consequences may be different, and are to be considered. The general rule is settled in England that a *bona fide* purchase requires both the payment of all the price and the execution and delivery of the conveyance before the receipt of notice by the purchaser. In other words, if the party has received the conveyance before notice and paid the price after, or has paid the price before and received the conveyance after, in either instance the *bona fides* of the purchase is destroyed.[1] The American decisions are all agreed, that a notice received before any of the purchase price has been paid, as well after the deed of conveyance has been delivered as before, will destroy the *bona fides* of the purchase, and many of the decisions, following the English rule, attribute the same effect to a notice after a payment of part, but before the whole is paid.[2] Such a payment is, by some authorities, a protection *pro tanto*.[3] Finally the case of notice received after payment made, but before the deed of conveyance deliv-

[1] Wigg v. Wigg, 1 Atk. 382, 384; Story v. Lord Windsor, 2 Id. 630; Tourville v. Naish, 3 P. Wms. 307; Jones v. Stanley, 2 Eq. Cas. Abr. 685, pl. 9; More v. Mayhow, 1 Chan. Cas. 34; Rayne v. Baker, 1 Giff. 241; Tildesly v. Lodge, 3 Sm. & Gif. 543; Collinson v. Lister, 7 De G. M. & G. 634; 20 Beav. 356; Sharpe v. Foy, L. R., 4 Ch. 35, 37. The true meaning of this rule should not be misapprehended. If A. purchases in the first instance a legal estate, the rule of course applies to him. If he purchases or acquires in the first instance an equitable estate, the rule also applies *so far as that purchase is concerned*. For example, if A. receives a first mortgage which conveys the legal estate, and B. takes a second mortgage of the same form, purporting to convey the land, but which is, nevertheless, only an equitable conveyance, the rule requires that B. should both have advanced the money and obtained the instrument before receiving notice, in order to be a *bona fide* purchaser. This rule, however, does not prevent a person, who has thus acquired an equitable estate by conveyance in good faith, and who afterwards receives notice of a prior equity, from obtaining a conveyance of the outstanding legal estate and thus protecting himself from such equity. This latter power is recognized by an overwhelming array of English authority, and in fact forms one of the most frequent occasions for applying the doctrine of *bona fide* purchase.

[2] Baldwin v. Sager, 70 Ill. 503; Palmer v. Williams, 24 Mich. 328; Penfield v. Dunbar, 64 Barb. 239; and see cases *supra* under § 691; Wormley v. Wormley, 8 Wheat. 421, 449, 450; Frost v. Beekman, 1 Johns. Ch. 288; Murray v. Finster, 2 Id. 155; Jewett v. Palmer, 7 Id. 65; Losey v. Simpson, 3 Stockt. Eq. 246; Beck v. Uhrich, 1 Harris, 636, 639; Bennett v. Titherington, 6 Bush, 192; Wells v. Morrow, 38 Ala. 125 (must have paid the whole price); Moore v. Clay, 7 Ala. 742; Duncan v. Johnson, 13 Ark. 190; Simms v. Richardson, 2 Litt. 274; Blair v. Owles, 1 Munf. 38; Doswell v. Buchanan, 3 Leigh, 394; Blight's Heirs v. Banks, 6 Mon. 192; Halstead v. B'k of K'y, 4 J. J. Marsh, 554; Pillow v. Shannon, 3 Yerg. 508; Zollman v. Moore, 21 Gratt. 313; and see Wilson v. Hunter, 30 Ind. 466, 471.

[3] See *ante*, § 750.

ered, has given rise to a direct conflict of judicial opinion. One group of decisions adopts and lays down the English rule that the purchase, under these circumstances, is not *bona fide*.[1] Another line of cases holds in the most positive and general manner, that, where the purchaser has paid the consideration without notice of any prior claim, and after receiving notice he obtains a conveyance of the legal estate, he becomes to all intents a *bona fide* purchaser, and is entitled to all the protection belonging to that position. And this result seems to be applied without limitation, to the acquisition of every kind of equitable estate, interest, or right.[2]

§ 756. **Effect of Notice on the Bona Fide Purchase of Equitable Interests.**—An attempt to reconcile these conflicting authorities would be vain. I can only state what seem to be the necessary conclusions from well-established equitable principles. In the first place, the rule last stated can not be extended to all equitable interests, without violating elementary principles. Between two successive equal equities, the order of time controls, without regard to the fact of consideration or notice; the one subsequent in time obtains no preference by paying consideration without notice. Equities are thus equal where both parties are equally innocent and equally diligent. If an owner of land gives an agreement to convey it to A., who pays all or part of the price, and afterwards gives a second agreement to convey to B., who enters into the contract and pays all or part of the price without any notice of the prior claim of A., clearly B. would have obtained no equitable advantage from the fact of his contract and payment without notice; A.'s interest would be of the same character and extent, and his priority of time would give him priority of right. To say that B., being thus inferior in equitable right, may, upon receiving

[1] Peabody v. Fenton, 3 Barb. Ch. 451, 464, 465; Grimstone v. Carter, 3 Paige, 421, 437; Fash v. Ravesies, 32 Ala. 451; Moore v. Clay, 7 Id. 742; Wells v. Morrow, 38 Id. 125; Duncan v. Johnson, 13 Ark. 190; Osborn v. Carr, 12 Conn. 195, 198; Bennett v. Titherington, 6 Bush, 192; Simms v. Richardson, 2 Litt. 274; Blair v. Owles, 1 Munf. 38; Doswell v. Buchanan, 3 Leigh, 394; Blight v. Bank, 6 Mon. 192; Halstead v. B'k of K'y, 4 J. J. Marsh. 554; Pillow v. Shannon, 3 Yerg. 508.

[2] Carroll v. Johnston, 2 Jones Eq. 120; Baggarly v. Gaither, 2 Id. 80; Leach v. Ansbacher, 55 Pa. St. (5 P. F. Sm.) 85; Gibler v. Trimble, 14 Ohio, 323; Mut. Ass. Soc. v. Stone, 3 Leigh, 218; Wheaton v. Dyer, 15 Conn. 307, 310; and see Phelps v. Morrison, 24 N. J. Eq. (9 C. E. Green), 195. In Carroll v. Johnston, *supra*, the question was presented very sharply. Plaintiff held under a prior vendee A.; defendant was a subsequent vendee who had paid part of the price before notice of A.'s claim; after receiving notice he obtained a conveyance from the original vendor, and was held to be a *bona fide* purchaser and protected. Certainly there is nothing in the settled principles of the doctrine concerning *bona fide* purchase, which can sustain such a conclusion.

notice of A.'s contract, obtain a conveyance from the owner, and thus establish a precedence over A., is to misapply the doctrine of *bona fide* purchase, and to ignore a familiar principle of equity that one who acquires a title with notice of a prior equity, takes it subject to that equity. The same is true of all subsequent equitable interests, liens, and claims not arising from conveyances or instruments which purport to be conveyances of the entire estate. This conclusion is fully sustained by the ablest authorities, English and American.[1] In the second place,

[1] It is one of the fundamental positions established by Lord Westbury in the celebrated case of Phillips v. Phillips (§§ 414 (n.), 742). In Peabody v. Fenton, 3 Barb. Ch. 451, 464, 465, A. obtained an assignment of a bond and mortgage from the owner by gross fraud, and assigned it to B., who had no actual notice, and who parted with value, although, as the court held, under suspicious circumstances which ought to have put him on the inquiry, and which of themselves showed the absence of good faith. Chancellor Walworth also held that B.'s title was worthless upon another ground, as follows: "Again, to protect a party as a *bona fide* purchaser without notice, he must have acquired the legal title, as well as an equitable right to the property." [He refers to the case of a conveyance of land obtained by fraud, which is voidable at the election of the grantor, but where the fraudulent grantee has the power to transfer a valid title to a *bona fide* purchaser without notice of the fraud, and continues:] "But if such *bona fide* purchaser has not obtained the legal title by an actual and valid conveyance, he can not protect himself against the prior equity of the original owner to rescind the conveyance to the fraudulent grantee; although such *bona fide* purchaser *has a contract for conveyance, and has actually paid for the land.*" If A. has, through fraudulent representations, conveyed land to B., so that the conveyance might be set aside at A.'s suit, and while B. thus held the apparent legal title, he should create an equitable lien upon the land in favor of C., by means of contract as security for money loaned, the money being advanced without notice of the fraudulent defect in B.'s title; or B. should give a contract of sale of the land to C., the price being paid without notice of the fraud; C.'s equitable interest in either case would be clearly subordinate to A.'s prior and therefore superior equity. A. could in one suit set aside the conveyance to B., and cut off the equitable lien which had attached in favor of C. If C., after learning of the fraud and A.'s right resulting from it, should obtain a conveyance of the legal estate from B., he would clearly be in no better position; he could not upon principle claim the protection given to a *bona fide* purchaser; he would certainly come under the operation of the doctrine that one who takes even a legal title with notice of a prior equity, takes and holds subject to that equity, and barred by its obligations. These illustrations may appear trite and elementary, but they will serve to explain some judicial *dicta*, which, in all their generality of expression, would be misleading. In Grimstone v. Carter, 3 Paige, 421, 437, Chan. Walworth stated the doctrine most clearly and accurately: "This court will not permit the party having the *subsequent equity* to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity. To protect a party, therefore, and to enable him to defend himself as a *bona fide* purchaser for a valuable consideration, he must aver in his plea or state in his answer not only that there was an equal equity in himself by reason of his having actually paid the purchase money, but that he had also clothed his equity with the legal title *before he had notice of the prior equity.*" The contrary decisions illustrate the very remarkable tendency exhibited by some of the state courts to go far beyond the established principles of equity, and to deal with mere equitable interests as though they had all the features and incidents of legal estates, while in other matters the same courts may fail or refuse to adopt principles equally well settled which define the equitable jurisdiction, or which recognize the existence of equitable rights.

the English decisions are numerous to the effect that when one has purchased an equitable *estate*, and has received the instrument conveying the same and paid the entire consideration without notice of a prior conflicting claim, he may, upon receiving notice thereof, procure a transfer of the outstanding legal title and thereby obtain protection. This mode of *bona fide* purchase, it will be found, is strictly confined to cases in which the purchaser acquires an *estate* although equitable, and therefore acquires and holds through an instrument which purports to be and operates as a conveyance of the land. The most common example is that of a subsequent mortgagee of land, through a mortgage in the ordinary form of a legal conveyance, where his estate is necessarily equitable, since the legal estate has been conveyed to and is outstanding in the first mortgagee. The true force and effect of these English decisions have sometimes, I think, been misapprehended by American courts.[1] The only

[1] An opinion contrary to these conclusions has been maintained by a recent able text-writer (see Jones on Mortgages, vol. 1, § 581), and a *dictum* of Lord Hatherley, in the recent case of Pilcher v. Rawlins, L. R., 7 Ch. 259, 267, is cited in support of that view. But when the *dictum* is read in connection with its context, and in the light of the facts and circumstances of the case, and of the decision made, it will be found not only to be consistent with, but to fully sustain, the distinction which I have drawn. Lord Hatherley, after referring to some observations by Lord Eldon in Maundrell v. Maundrell, 10 Ves. 246, and *Ex parte* Knott, 11 Id. 609, said: "It appeared to me then, as now, that Lord Eldon applied his observations to a case in which the purchaser had advanced his money in good faith, but took the legal estate afterwards from one whom he knew to be a trustee for others, distinguishing that case from the *case of a legal estate acquired by paying off a mortgage*. In itself it is immaterial whether the purchaser knows or not that another has an equitable interest prior to his own, provided he did not know that fact on paying his purchase money. It may perhaps be sufficient in all possible cases for the purchaser to say, I am not to be sued in equity at all. *I hold what was conveyed to me by one in possession, who was or pretended to be seised, and who conveyed to me without my having notice of another equitable title;* and that the plaintiff in equity must disprove the plea before he can proceed any further in his suit." Now it is entirely uncritical to take the single sentence beginning, "in itself it is immaterial" etc., from the above passage, separate it from its context, and make it an universal rule applicable to all kinds of subsequent equitable interests and liens, as well as estates. The facts of this case, the opinions of Lord Eldon referred to, the language of Lord Hatherley, and especially the closing sentences of the quotation, show with absolute certainty that he is speaking only of those cases in which a subsequent purchaser acquires an estate by means of a conveyance purporting to convey the title to the land, supposing it to be the legal estate, but which turns out to be only an equitable estate. If he acquired such estate in good faith, he may afterwards, upon learning of the prior right, get a conveyance of the legal title and be protected. It is demonstrable that Lord Hatherley is not referring to those who acquire mere equitable interests, liens, and the like, and that he is not interfering with the settled doctrines of priority from time among successive equities. If there could be a possible doubt as to the meaning of Lord Hatherley's language, it is completely put at rest by the opinion of James, L. J., in the same case (p. 268). He begins his opinion as follows: "I do not mean to refer to a class of cases which

conclusions consistent with settled principles are the following. It is only where a party has acquired an equitable *estate* by means of a conveyance which purported to convey the land itself, and has received the instrument and paid the consideration without notice of a prior claim, that he can, after notice, procure the legal title and with it the protection of a *bona fide* purchaser. Where a party has acquired only an equitable lien or interest, not by conveyance, and has advanced the consideration without notice, he can not, after notice, get in the legal estate and thus obtain precedence over a prior equity.

§ 757. **3. Recording in Connection with Notice.** — This general subdivision involves two entirely distinct matters. (1) The first deals with the record in its operation and effects as a constructive statutory notice to all subsequent purchasers and incumbrancers. This aspect of recording has already been examined in a former section, and nothing need here be added.[1] (2) The second deals with notice in its effects upon the holder of a subsequent conveyance or mortgage who obtains the earliest record, how and when it defeats his *bona fide* character and destroys the advantage of his first record. Or, to state the same affirmatively, what is necessary to make the holder of a subsequent conveyance, who obtains the earliest record, a *bona fide* purchaser, so that he may secure the precedence under the statute by means of his record. Although this branch of the subject has also been considered,[2] it will be convenient to recapitulate the results as a part of the present discussion.

§ 758. **The Interest under a Prior Unrecorded Conveyance.**—Although the statutes pronounce unrecorded deeds and mortgages to be void as against subsequent purchasers who have complied with their provisions, yet in the practical operation of this legislation the right created by a prior unrecorded instrument is generally regarded as tantamount to an equitable interest, which may therefore be cut off by a subsequent pur-

appear to me entirely distinct in principle from the case now before us. I mean that class of cases in which a person finding himself in possession *under a defective title*, has cast about to cure that defect by procuring some one else to convey an outstanding legal estate. No doubt it has been held in this court that a man under those circumstances may get in a mortgage and tack his defective title to the estate of that mortgagee." The doctrine of "tacking" has been repudiated by the American courts, and they have thus rejected that application of the rule under discussion which has been altogether the most frequent in England.

[1] See *supra*, §§ 655–658; Baker v. Griffin, 50 Miss. 158. Subsequent purchaser is not charged with constructive notice by the record of an incumbrance created by a person other than those through or from whom he is compelled to trace his record title.

[2] See *supra*, §§ 659–664.

chaser or incumbrancer who is in all respects *bona fide*, and who has also obtained the first record. The total effect of the system is thus twofold; it both enlarges the scope of the doctrine concerning *bona fide* purchase, by extending it to all those interests, legal or equitable, which are required or permitted to be recorded, and it adds to the elements constituting a *bona fide* purchase the further requisite of a registration.

§ 759. **Requisites to the Protection from the First Record by a Subsequent Purchaser.**—It follows that in order to obtain the benefit of the first recording, the subsequent purchase or incumbrance must be for a valuable consideration within the meaning of the general doctrine. Although the subsequent purchaser or incumbrancer had no notice of the unrecorded instrument, still if he had not paid a valuable consideration, he would not gain any superior title or lien by his earlier registration.[1] Since the subsequent purchaser or incumbrancer must be *bona fide* in order to claim the benefits of the first registration, it also follows that if such subsequent purchaser or incumbrancer was, in taking his conveyance, mortgage, or other instrument required or permitted to be recorded, chargeable with notice of a prior unrecorded conveyance or incumbrance, within the operation of the settled rules concerning the nature of notice and the time and mode of its reception, then he is not a *bona fide* purchaser, and does not obtain the statutory superiority of title or precedence of lien by his earliest registration. This construction was put upon the English statutes at an early day, and has been adopted in nearly all the American states.[2] These exceptional states are Ohio and North Carolina.

[1] It is held in some of these cases that in a contest between the holder of the prior unrecorded conveyance, and the subsequent grantee or mortgagee who has obtained a record, the burden of proof is on the latter of showing affirmatively that he paid a valuable consideration and had no notice; the record itself is not enough. Landers v. Bolton, 26 Cal. 393; Snodgrass v. Ricketts, 13 Cal. 359; Plant v. Smythe, 45 Cal. 161; Long v. Dollarhide, 24 Id. 218; but the contrary rule is established by many other cases which hold that the burden of proof is on him who claims the priority and charges the other with having had notice. Center v. Planters' etc. B'k, 22 Ala. 743; Miles v. Blanton, 3 Dana, 525; McCormick v. Leonard, 38 Iowa, 272; Fort v. Burch, 6 Barb. 60, 78; Van Wagenen v. Hopper, 8 N. J. Eq. (4 Halst. Ch.) 684, 707; Cary v. White, 52 N. Y. 138; Dickerson v. Tillinghast, 4 Paige, 215; Harris v. Norton, 16 Barb. 264; Nice's Appeal, 54 Pa. St. (4 P. F. Sm.) 200; Spackman v. Ott, 65 Id. (15 Id.) 131; Maupin v. Emmons, 47 Mo. 304; and see cases cited under §§ 747, 750, 751.

[2] See *supra*, §§ 659, 660; Jones on Mortg., vol. 1, §§ 570–573. In the following discussion of recording in connection with notice, I have availed myself of Mr. Jones' able and full treatment of the same subject in his work on mortgages, a work which I may be permitted to say is a credit to the legal literature of the country. In the United States the equitable applications of the doctrine concerning *bona fide* purchase, as modified by the

§ 760. **Purchaser in Good Faith with Apparent Record Title from a Grantor Charged with Notice of a Prior Unrecorded Conveyance.**—This rule is of very easy application under all ordinary circumstances between two consecutive deeds or mortgages where the second is recorded before the first. Circumstances may arise which present questions of great intricacy and difficulty, and occasion, perhaps, a conflict of judicial opinion. A grantee or mortgagee, being a purchaser in good faith, and holding a record title which appears perfect, may really have no title because a grantor or a mortgagor in the chain of title had knowledge, when he took the conveyance to himself, of a prior unrecorded deed or mortgage, which was, however, recorded before his own deed or mortgage to his own grantee. The essential facts giving rise to such a question are

recording acts, are mainly confined to mortgages. I desire to acknowledge the assistance I have received and the material which I have borrowed from Mr. Jones' work. Rolland v. Hart, L. R., 6 Ch. 678; Benham v. Keane, 1 J. & H. 685; Le Neve v. Le Neve, Ambl. 436; Forbes v. Deniston, 4 Bro. P. C. 189; Hine v. Dodd, 2 Atk. 275; Davis v. Earl of Strathmore, 16 Ves. 419; Wyatt v. Barwell, 19 Id. 435, 438; Tunstall v. Trappes, 3 Sim. 286, 301; Ford v. White, 16 Beav. 120, 123; Woodworth v. Guzman, 1 Cal. 203; Fair v. Stevenot, 29 Id. 486; Mahoney v. Middleton, 41 Id. 41, 50; Galland v. Jackman, 26 Id. 79, 87; Lawton v. Gordon, 37 Id. 202; Thompson v. Pioche, 44 Id. 508, 516; O'Rourke v. O'Connor, 39 Id. 442, 446; Smith v. Yule, 31 Id. 180; Beal v. Gordon, 55 Me. 482; Copeland v. Copeland, 28 Id. 525; Hart v. Farm. & Mech. B'k, 33 Vt. 252; Day v. Clark, 25 Id. 397, 402; Tucker v. Tilton, 55 N. H. 223; Flynt v. Arnold, 2 Met. 619; George v. Kent, 7 Allen, 16; White v. Foster, 102 Mass. 375; Hamilton v. Nutt, 34 Conn. 501; Jackson v. Burgott, 10 Johns. 457, 459; Jackson v. Van Valkenburgh, 8 Cow. 260; Jackson v. Post, 15 Wend. 588; Van Rensselaer v. Clark, 17 Id. 25; Fort v. Burch, 5 Denio, 187; Ring v. Steele, 3 Keyes, 450; Butler v. Viele, 44 Barb. 166; La Farge F. Ins. Co. v. Bell, 22 Id. 54; Schutt v. Large, 6 Id. 373; Goelet v. McManus, 1 Hun, 306; Smallwood v. Lewin, 15 N. J. Eq. 60; Mathews v. Everitt, 23 Id. (8 C. E. Green), 473; Conover v. Van Mater, 18 Id. (3 Id.) 481; Jaques v. Weeks, 7 Watts, 261; Union Canal Co. v. Young, 1 Whart. 410, 432; Solms v. McCulloch, 5 Pa. St. (5 Barr.) 473; Nice's Appeal, 54 Pa. St. (4 P. F. Sm.) 200; Ohio etc. Co. v. Ross, 2 Md. Ch. 25. Owens v. Miller, 29 Md. 144; Johnston v. Canby, 29 Id. 211; Lambert v. Nanny, 2 Munf. 196; Gibbes v. Cobb, 7 Rich. Eq. 54; Nelson v. Dunn, 15 Ala. 501; Harrington v. Allen, 48 Miss. 493; Smith v. Nettles, 13 La. An. 241; Myers v. Ross, 3 Head, 60; Underwood v. Ogden, 6 B. Mon. 606; Forepaugh v. Appold, 17 Id. 625; Sparks v. State B'k, 7 Blackf. 469; Farmers' B'k v. Bronson, 14 Mich. 361; Baker v. Mather, 25 Id. 51; Bayliss v. Young, 51 Ill. 127; Gilbert v. Jess, 31 Wisc. 110; Fallass v. Pierce, 30 Id. 443; Bell v. Thomas, 2 Iowa, 384; English v. Waples, 13 Id. 57; Coe v. Winters, 15 Id. 481; Sims v. Hammond, 33 Id. 368; Musgrove v. Bonser, 5 Oreg. 313. *Exceptions.*—In Ohio and North Carolina, the courts have held, in construing the somewhat special language of the local statutes, that notice, whether actual or constructive, of a prior unrecorded instrument, shall not affect the precedence acquired by the earlier record of a subsequent conveyance or mortgage. It has already been shown (*ante*, § 722) that in Ohio a docketed judgment has precedence over a prior unrecorded mortgage. Bercaw v. Cockerill, 20 Ohio St. 163; Bloom v. Noggle, 4 Id. 45; Mayham v. Coombs, 14 Ohio, 428; Stansell v. Roberts, 13 Id. 148; Robinson v. Willougby, 70 N. C. 358; Fleming v. Burgin, 2 Ired. Eq. 584.

as follows: A. gives a deed to B. which for a while is unrecorded. A. subsequently conveys the same land to C., who pays a valuable consideration, but who has actual notice of B.'s prior deed, and C. puts his deed on record first. B., then, after the recording of C.'s deed, puts his own prior deed on record. After the record of B.'s deed, C. conveys the land to D., who pays a valuable consideration, and has no *actual* notice of B.'s deed, and only the constructive notice given by the record. The facts might be varied by supposing mortgages in place of deeds. Which has the priority, B. or D.? There are earlier decisions which give the precedence to D.[1] These decisions, however, have been overruled in the same states in which they were given, and it is now settled by an overwhelming weight of authority, that B. would have the precedence over D. It is plain that C. got no title by his first recording, because he had actual notice. When C. conveyed to D., if B.'s deed had not then been on record, and D. had put his own deed on record before B.'s deed was recorded, D. would have obtained the title. But the record of B.'s deed prior to the conveyance to D., cut off the latter's precedence, because D. could claim nothing from C.'s *first* record, by reason of C.'s having actual notice.[2] This result evidently rests upon the

[1] Connecticut v. Bradish, 14 Mass. 296, 303; Trull v. Bigelow, 16 Id. 406; Glidden v. Hunt, 24 Pick. 221; Ely v. Wilcox, 20 Wisc. 523, 530; and see 2 Eq. Lead. Cas., Am. notes, pp. 40, 41, 212 (4th Am. ed.) The reason given is, that D. on taking his deed or mortgage, and on making search, would find an unbroken chain of record title from himself through C. up to A., and that he was under no obligation to go out of such a chain of record title, and search for deeds or mortgages to persons *by* or through whom he did not derive his title.

[2] Jones on Mort., v. 1, §§ 574, 575; Flynt v. Arnold, 2 Met. 619; Mahoney v. Middleton, 41 Cal. 41, 50; Fallass v. Pierce, 30 Wisc. 443; English v. Waples, 13 Iowa, 57; Sims v. Hammond, 33 Id. 368; Van Rensselaer v. Clark, 17 Wend. 25; Jackson v. Post, 15 Id. 588; Ring v. Steele, 3 Keyes, 450; Schutt v. Large, 6 Barb. 373; Goelet v. McManus, 1 Hun, 306. In Flynt v. Arnold, *supra*, Shaw, C. J., said: "Suppose, for instance, A. conveys to B., who does not immediately record his deed. A. then conveys to C., who has notice of the prior unregistered deed to B.; C.'s deed though first recorded, will be postponed to the prior deed to B. Then, suppose B. puts his deed on record, and afterwards C. conveys to D. If the above views are correct, D. could not hold against B.; not in the right of C., because, in consequence of actual knowledge of the prior deed, C. had but a voidable title; and not in his own right, because, before he took his deed, B.'s deed was on record, and was constructive notice to him of the prior conveyance to B. from A., under whom his title is derived. But in such a case, if before B. recorded his deed, C. had conveyed to D. without actual notice, then D., having neither actual nor constructive notice of the prior deed, would take a good title. And, as D. in such case would have an indefeasible title himself against B.'s prior deed, so, as an incident to the right of property, he could convey a good and indefeasible title to any other person, although such grantee should have full notice of the prior conveyance from A. to B. Such purchaser, and all claiming under him, would rest on D.'s indefeasible title,

fact—and there all of the decisions place it—that C. took with actual notice, and so could acquire no precedence by his earliest record. If this fact were otherwise, if C. had no notice and first put his deed or mortgage upon record, he would then clearly obtain a perfect title or superior lien over B.'s prior but unrecorded deed. That being the case, and C. having obtained an indefeasible title, if he should then convey to D., who had notice, the latter, by virtue of another settled rule, would succeed to *his* grantor's rights, and also acquire a like perfect title, as Ch. J. Shaw expressly states in the passage quoted. The same would be true in the succession of purchasers, each obtaining a record but each affected with notice. As soon as any one in the series purchases for value and without notice and places his conveyance upon record, he acquires a title or lien secure as against the earliest unrecorded deed to B. This necessarily leads to another most important rule concerning notice in connection with recording, and the extent to which a record is constructive notice to subsequent purchasers and incumbrancers.

unaffected by any early defect of title, by want of registration, which had ceased to have any effect on the title, by a conveyance to D. without notice, from one having a good apparent record title." Shaw, C. J., criticises the earlier Massachusetts cases, and adds some very valuable remarks upon the general policy and operation of the recording acts, and the duties of purchasers in searching the records. The New York case of Van Rensselaer v. Clark, *supra*, is a leading authority in support of the proposition contained in the text, and has been followed by all the other decisions in the same state. In Mahoney v. Middleton, *supra*, the supreme court of California squarely meets the question, and decides in full accordance with the foregoing Massachusetts and New York cases. The same rule applies, not only to one, but to any number of successive grantees and grantors, who have put their conveyances on record, but who have had notice of a prior unrecorded deed or mortgage, or who have not paid a valuable consideration. In the recent case of Fallass v. Pierce, 30 Wisc. 443, Dixon, C. J., discussing the same general question, and adopting the same supposition as that given in the text and used by Shaw, C. J., said: "If in the case supposed, C. took his deed with knowledge of the prior conveyance to B., and had then conveyed to D., who had like knowledge, and D. should convey to E., and so on, conveyances should be executed to the end of the alphabet, each subsequent grantee having knowledge of B.'s prior right, and all of their conveyances being recorded, yet then, if B. should record his deed before the last grantee with knowledge, and Z. should make conveyance, the purchaser from Z. would be bound to take notice of B.'s right, and of the relations existing between him and all the subsequent purchasers from C. to Z. inclusive. And in the same case, if Z. should sell to a purchaser in good faith for value from him, yet if B. should get his conveyance recorded *before* that of such purchaser, his title would be preferred, because of such first record. And it is manifest that the same result would follow if in the case supposed none of the subsequent grantees, from C. to Z. inclusive, paid any valuable consideration for the land, or, if in the case of each successive grantee, his title was defective and invalid as against B., either by reason of his knowledge of B.'s title, or because he was a mere volunteer, paying no consideration whatever for the conveyance."

§ 761. **Break in the Record Title; When Purchaser is still Charged with Notice of Prior Unrecorded Title.**— A purchaser or incumbrancer is not, in general, bound to search the records for incumbrances as against a title which does not appear on the record. From the general policy of the recording acts to protect purchasers and incumbrancers against prior unrecorded deeds and mortgages, it necessarily follows that the title upon record, in the absence of notice *aliunde*, is the purchaser's protection. As has been shown in the section upon notice,[1] the record of a conveyance or of a mortgage is a constructive notice to those and to those only who must trace their title from or through the grantor or the mortgagor by whom the deed or mortgage was executed. If there is a break in the chain of record title, the records will not enable the purchaser to supply the missing links and to connect the broken parts by any systematic search. If a purchaser has traced the title by the records regularly up or down to A., and the record does not show the title out of A., then the statutes render A.'s title a protection to the purchaser under it. As a general rule, therefore, if the records show a regular chain of conveyances from A. to B., from B. to C., the record of a mortgage or deed of the same land from B., *prior to the date of the conveyance by which he received the title from his grantor A.*, would not affect a purchaser or mortgagee from C. with notice.[2] Notwithstanding

[1] See *supra*, § 658.

[2] Page v. Waring, 76 N. Y. 463, 467–469; Cook v. Travis, 20 Id. 400; Farmers' Loan & T. Co. v. Maltby, 8 Paige, 361; Losey v. Simpson, 3 Stockt. Eq. 246; Calder v. Chapman, 52 Pa. St. (2 P. F. Sm.) 359; Wing v. McDowell, Walker (Mich.), 175. The late case of Page v. Waring, *supra*, clearly illustrates this rule. The controversy was between two titles. Peter Poillon owned the land in 1827. In 1827 he gave a deed of it to one Hart, but this deed was not recorded until 1864. In 1830 Hart executed a deed to one Greenly which was recorded at once. In 1863, a deed from Greenly's executors was given to the plaintiff and recorded. "This is the chain of the plaintiff's title, upon which he bases his right to recover, and if there was nothing to break this chain, his right would be plain enough." The following is the chain of defendant's title. In 1861, Peter Poillon gave a deed of the same land to Goldsmith, which was recorded immediately. In 1862 Goldsmith gave a deed of an undivided half of the land to Marks, which was recorded in September of that year. In March, 1863, Goldsmith and Marks gave a deed of the land to Morton, which was recorded during the same month. In 1869, Morton conveyed to Fox, and immediately after Fox to the defendant, both deeds being immediately put on record. "It will be seen that the defendant has a regular chain of title from Poillon, and that all the deeds of his claim, down to and including the deed to Morton, were recorded before the deed from Poillon to Hart was recorded; and this priority upon the records presents the question to be considered in determining the rights of the parties." Earl, J., said (p. 468): "It matters not that the deed from Hart to Greenly was recorded before the deeds in the defendant's chain of title; because, if the defendant, by reason of the record of the deeds under which he holds, has priority over the deed to Hart, and a title good as against that deed, then there is a break in the plaintiff's chain

the generality of this rule, a purchaser or incumbrancer *may* be bound to search for incumbrances as against a title not appearing of record, and may therefore be affected with notice by such incumbrances. Thus, in the case last supposed, if before the conveyance to B. from A., B. had held some estate legal or equitable, which was a mortgagable interest, though not the legal fee, and had given a mortgage while holding such estate, which was put on record, the mortgage being executed and recorded before he received the deed of the fee from A., then if the purchaser from C. had notice of the fact that B. held such an estate, he would be bound to search the records for any mortgage made by B. while holder thereof, and would be affected with constructive notice by the record of such a notice. The equitable estate of a vendee in possession under an executory contract for sale, even in states where the contract is not to be recorded, and even when it is verbal, is such a mortgageable interest; and if the vendee gives a mortgage which is recorded, before he obtains a conveyance of the fee, a purchaser who has notice of his prior equitable interest must search for the mortgage; it would take precedence over his own conveyance or incumbrance.[1] The notice of such mortgageable interest might be actual, or constructive; and an example of the latter kind would be that given by recitals in a deed through which the subsequent purchaser must derive his title.[2] What is notice, in its various forms and species, has been considered in a former section.[3]

§ 762. **III. Good Faith Necessary.**—The most general

of title, and no title could be derived from Hart that would be good as against the defendant. (Cook v. Travis, 20 N. Y. 400.) And it matters not that all the deeds in the plaintiff's chain were recorded before the conveyance by Morton to Fox, and by Fox to the defendant; because, if Morton was protected by the recording act, and had good title under such act, then the persons taking title under him were also protected (Webster v. Van Steenbergh, 46 Barb. 211; Wood v. Chapin, 13 N. Y. 509; Hooker v. Pierce, 2 Hill, 650)." * * * After quoting the sections of the statutes, he adds; "Under these acts, the unrecorded deed, though prior in date, has no effect as to the subsequent deed first recorded, and the subsequent deed conveys the title as if the first deed had not been executed. Hetzel v. Barber, 69 N. Y. 1."

[1] Crane v. Turner, 7 Hun, 357; affirmed 67 N. Y. 437.

[2] Crane v. Turner, 7 Hun, 357; 67 N. Y. 437. Thus the subsequent purchaser or incumbrancer must derive his title not only through the deed from B. to C., but also through that from A. to B. If the latter deed should contain a recital that the grantee B. had been in possession of the land for a certain period of time prior to the execution of the deed, under a contract for the sale of the land, the purchaser would, by such recital, be charged with notice of B.'s equitable interest, and that it was a mortgageable interest, and would be bound to search for incumbrances created by B. during the entire period while he was in possession by virtue of his equitable interest as stated by the recital.

[3] See *supra*, section V, §§ 591–676.

statement of the doctrine describes the purchase as one made in good faith for a valuable consideration and without notice. It is true that in most instances the want of good faith consists in the completion of the purchase after the party has been charged with notice, for such conduct is regarded by equity as constructively fraudulent.[1] The requisite of good faith extends much further. A purchaser may part with a valuable consideration, may have no notice of any opposing claim, and yet lack the good faith which is essential to render his position a protection, and his defense available. It is an elementary doctrine, therefore, that, independently of notice and valuable consideration, any want of good faith on the purchaser's part, any inequitable conduct of his, such as fraud committed in the transaction against his own immediate vendor or grantor, or a participation in an intended fraud against the creditors of his vendor or grantor, or his obtaining the transfer through misrepresentations or concealments which are inequitable, although not amounting to positive fraud, and the like, will destroy the character of a *bona fide* purchase, and defeat the protection otherwise given to it. The party claiming to be a *bona fide* purchaser must come into a court of equity with absolutely clean hands.[2]

§ 763. **Third: Effects of a Bona Fide Purchase as a Defense.**—Having explained the *rationale* of the doctrine, and ascertained what elements enter into the conception of a *bona fide* purchase, I pass to consider with somewhat more of detail the effects which it produces by way of a defense in equitable suits, the protection which it affords to a defendant. Pursuing the order already mentioned, adopted by Lord Westbury, the various cases in which the defense will prevail may be collected into three classes: (1) Where the holder of a legal estate appeals to the auxiliary jurisdiction of equity for relief; (2) Where the holder of an equitable estate seeks relief against a subsequent purchaser of the legal estate, or against a purchaser of a subsequent equitable estate who has obtained the legal estate; (3) Where the holder of a mere "equity," or right to some distinctively equitable relief, as distinguished from an equitable estate, seeks to enforce it against a subsequent purchaser of either a legal or an equitable estate.

[1] See *supra*, § 591.

[2] Cram v. Mitchell, 1 Sandf. Ch. 251. There are some old cases in which a so-called *bona fide* purchaser, through fraud or violence, was protected. See Culpepper's case, cited in Sanders v. Deligne, Freem. Ch. 123; Fagg's case, cited in 2 Vern. 701; 1 Chan. Cas. 68; Harcourt v. Knowel, cited in 2 Vern. 159; but they have long been overruled; see Carter v. Carter, 3 K. &. J. 617, 636, 637; Zollman v. Moore, 21 Gratt. 313, 321.

§ 764. **I. Suits by Holder of the Legal Estate under the Auxiliary Jurisdiction of Equity.**—As cases falling within this class are very infrequent in the United States, no detailed discussion seems to be necessary. The kinds of suits embraced within the term "auxiliary jurisdiction," as here used, are those for discovery proper, those for the delivery up of title-deeds in connection with discovery, those to prevent a defendant in ejectment from setting up outstanding terms to defeat the action, and those to perpetuate testimony. It has been settled from an early day, that no suit for a discovery can be maintained by the holder of the legal estate in order to assist him in maintaining his title against a *bona fide* purchaser of an equitable estate, further than as to facts relevant to the question whether the defendant had notice. After such purchaser has sufficiently denied notice, he will not be compelled to make discovery in aid of plaintiff's title.[1] It is equally well settled that the holder of the legal estate can not compel a delivery up of the title-deeds by a *bona fide* purchaser of an equitable estate—for example, an equitable mortgagee—even though some other relief, such as a foreclosure, may have been granted.[2] The defense

[1] Burlace v. Cooke, Freem. Ch. 24, *per* Lord Nottingham; Parker v. Blythmore, Prec. Ch. 58, *per* Sir John Trevor, M. R.; Basset v. Nosworthy, Rep. temp. Finch, 102; 2 Eq. Lead. Cas. 1, *per* Lord Nottingham. (This is the leading case. An heir at law sued a purchaser from a devisee of plaintiff's ancestor seeking to discover a revocation of the will, and also to set aside certain outstanding terms which defendant bought in order to protect his equitable title. The defense of *bona fide* purchase was sustained against both reliefs.) Jerrard v. Saunders, 2 Ves. 187, 454, *per* Lord Loughborough, a bill for discovery only.

[2] Wallwyn v. Lee, 9 Ves. 24 (a life tenant mortgaged property in fee, fraudulently concealing the fact of his mere life estate and pretending to be owner in fee, and delivered the title deeds to the mortgagee. On his death the remainder-man sued for a discovery and to have the deeds surrendered. Lord Eldon sustained the defense of *bona fide* purchase); Joyce v. De Moleyns, 2 Jo. & Lat. 374 (an heir at law of a deceased owner obtained possession of the title-deeds, and deposited them with bankers as security by way of equitable mortgage for a loan. The real title was in a devisee from the deceased owner. A suit was brought on behalf of the devisee to compel a delivery up of the deeds by the bankers, but the relief was refused by Chancellor Sugden); Heath v. Crealock, L. R., 10 Ch. 22, 28 (a mortgagor, fraudulently concealing the fact of the outstanding mortgage which had conveyed the legal estate, sold and conveyed the property to the defendant and handed over the title-deeds. The prior mortgagee sues for a foreclosure and a delivery up of the deeds. While the foreclosure was granted, the other relief was refused. It should be noticed that the defendant, although receiving a conveyance purporting to transfer the legal estate, only obtained an equitable estate, since the legal estate had already been vested in the prior mortgagee, the plaintiff; also that the defense of *bona fide* purchase under these circumstances did not prevent the main relief of a foreclosure); Waldy v. Gray, L. R., 20 Eq. 238. See, however, Newton v. Newton, L. R., 6 Eq. 135; Id., 4 Ch. 143, where under the special facts Lord Romilly drew a distinction and ordered the deeds to be surrendered. The opinion of Lord Hatherley in this case on appeal is valuable as drawing the line between the cases of succes-

likewise prevails in suits, unknown in this country, brought by the legal owner against a defendant who has been sued in ejectment to restrain the latter from setting up old outstanding legal terms in order to defeat a recovery in such action, and to set aside those terms.[1] Finally, it has been said that the defense of *bona fide* purchase is sufficient to defeat a suit for the perpetuation of testimony; but with respect to the correctness of this conclusion there is, at least, some doubt.[2]

§ 765. **Exceptions and Limitations.**—There are, however, well-considered and authoritative decisions, in which the defense has not been permitted to prevail against the holder of the legal estate suing for relief. Although these decisions were not in express terms placed by the judges rendering them upon the ground now mentioned, yet the general doctrine upon which they can alone be sustained and harmonized with the current of authority, is that first explained by Lord Westbury, and already stated.[3] Where the suit is one belonging to the *concurrent* jurisdiction of equity and law, and is brought by the holder of a legal title to obtain a relief purely legal, the defense of *bona fide* purchase will not prevail; because it would not prevail at law, and to allow it in equity, would simply be an abdication of its rightful jurisdiction by a court of equity, and a putting the plaintiff to the unnecessary expense and delay of a second action at law. Such suits especially are those brought to establish and recover dower, and those brought to establish tithes in England.[4] Whatever difference of opinion there may be as to the correctness of this limitation, it is fully settled in England,

sive equities where the priority is determined by order of time, and the cases where the purchaser of a subsequent equitable *estate* may set up the defense of *bona fide* purchase.

[1] Basset v. Nosworthy, Rep. temp. Finch, 102; Goleborn v. Alcock, 2 Sim. 552.

[2] The reasons which shield the purchaser from making a discovery which shall undermine his title, do not seem to apply to a mere suit for the perpetuation of testimony. Bechinall v. Arnold, 1 Vern. 354; Jerrard v. Saunders, 2 Ves. 454, 458, a *dictum* of Lord Loughborough, either sustain or seem to favor the defense; *per contra*, see Dursley v. Fitzhardinge, 6 Ves. 251, 263, 264, *per* Lord Eldon. See Cooper Eq. Pl. 56, 57, 283, 287.

[3] See *supra*, § 742.

[4] Williams v. Lambe, 3 Bro. Ch. 263, *per* Lord Thurlow (dower); Collins v. Archer, 1 Russ. & My. 284, *per* Sir John Leach (tithes), as explained by Lord Westbury in Phillips v. Phillips, 4 De G. F. & J. 208, 217. These decisions themselves, as well as the principle laid down by Lord Westbury, do not stand unchallenged. Their correctness has been denied by some; the explanation given by Lord Westbury has been rejected by others. See Bowen v. Evans, 1 Jo. & Lat. 178, 263; Att'y-Gen. v. Wilkins, 17 Beav. 285, 292; Payne v. Compton, 2 Y. & C. (Exch.) 457; Blain v. Harrison, 11 Ill. 384. Mr. Roper strongly upholds the correctness of the decisions and the ground upon which they are rested, 1 Roper on Husb. and Wife, 446; while Lord St. Leonards, in the later editions of his work on vendors, of course opposes the opinion of Lord Westbury.

independently of any statutes concerning registration, that the defense of *bona fide* purchase can not avail to defeat a suit for foreclosure brought by a prior *legal* mortgagee against a subsequent equitable mortgagee or purchaser of an equitable estate, who has paid a valuable consideration without notice of the prior mortgage.[1] The system of recording necessarily hinders the operation of this particular rule in the United States; but it is based upon principle, and in the absence of recording acts, would doubtless be adopted by our courts.

§ 766. **II. Suits by the Holder of an Equitable Estate or Interest against the Purchaser of the Legal Estate.**— This application of the doctrine includes not only purchasers who receive a conveyance of the legal estate at the time and as a part of their original and single purchase; but also those who having originally purchased and acquired merely an equitable estate, afterwards obtain a conveyance of the outstanding legal title from the one in whom it was vested. It has even been extended to such purchasers of an equitable estate, who have not yet actually acquired the legal title, but who have the best right to call for it. Cases in which this last phase of the doctrine can be *properly* applied, are, from the nature of our modes of dealing with real estate, very infrequent in the United States. The common occasions for a resort to the doctrine in England, where it is little affected by statutes of registration, are the cases of a prior equitable mortgage, and a subsequent sale and conveyance of the land by the mortgagor, he concealing the fact of such existing mortgage; of several consecutive mortgages of the same land, the later ones being taken in ignorance of the earlier; successive conveyances of his equitable estate by the same *cestui que trust*, the later purchaser being ignorant of the earlier transfer; and purchasers from a trustee in violation of his trust. In the United States the recording system has greatly modified the practical operation of the doctrine, since the defendant must generally show, in order to obtain protection, that he has recorded the instrument by which his title was acquired. With this additional feature, the instances most frequently coming before the American courts of equity are cases of a prior unrecorded mortgage and a subsequent recorded conveyance, a prior unrecorded and a subsequent re-

[1] Heath v. Crealock, L. R., 10 Ch. 22, 28; Waldy v. Gray, Id., 20 Eq. 238; Finch v. Shaw, 19 Beav. 500; affirmed *sub nom.* Colyer v. Finch, 5 H. L. Cas. 905. For the general doctrine upon which such cases must be rested, as laid down by Lord Romilly, see quotation *supra* in note under § 742.

corded mortgage, a prior contract of sale and a subsequent recorded conveyance or mortgage, a prior vendor's lien or other equitable lien and a subsequent recorded conveyance or mortgage, and a conveyance by a trustee of land subject to a prior trust, the trust being more often constructive or resulting than express. The case of a prior unrecorded deed purporting to convey the legal estate, and a subsequent recorded deed, depending wholly upon the recording acts, does not belong to the equitable jurisdiction.

§ 767. **Legal Estate Acquired by the Original Purchase.**—In the first place, it is the very central portion of the doctrine, to which all others have been additions, that where the defendant acquired the legal estate at the time and as a part of his original purchase, the fact of his purchase having been *bona fide* for value and without notice, is a perfect defense in equity to any suit brought by the holder of a prior equitable estate, lien, incumbrance, or other interest, seeking either to establish and enforce his equitable estate, lien, or interest, or to obtain any other relief with respect thereto which can be given by a court of equity.[1] A mortgagee of land may be a *bona fide* purchaser within the meaning of the general doctrine. In some states every mortgagee, subsequent as well as prior,

[1] See Basset v. Nosworthy, 2 Eq. Lead. Cas., pp. 1, 4, and notes (4th Am. ed.); Pilcher v. Rawlins, L. R., 7 Ch. 259, 268, 269, *per* James, L. J.; Willoughby v. Willoughby, 1 T. R., 763, 767, *per* Lord Hardwicke, and other cases cited in vol. 1, under § 200. In this country, it must be remembered, that the defense is only made available by the defendant's having first put his title-deed upon record. The following are some *illustrations* merely taken from innumerable decisions. A *bona fide* purchaser from a trustee of land subject to a *constructive or resulting trust* is protected against the claims of the beneficiaries. Wilson v. Western etc. Co., 77 N. C. 445; Bass v. Wheless, 2 Tenn. Ch. 531; Fahn v. Bleckley, 55 Ga. 81; Gray v. Coan, 40 Iowa, 327; Maxwell v. Campbell, 45 Ind. 360 (purchaser at judicial sale by a guardian, is protected against claims by the wards). *Against prior liens.*—Burchard v. Fair Haven, 48 Vt. 327 (attachment lien); Beall v. Butler, 54 Ga. 43 (laborer's lien); Jones v. Lapham, 15 Kans. 540 (equitable lien). *Against other equitable interests.*—Eldridge v. Walker, 80 Ill. 270; Farmers' Nat. B'k v. Fletcher, 44 Iowa, 252; Hardin v. Harrington, 11 Bush, 367; Briscoe v. Ashby, 24 Gratt. 454; Carter v. Allan, 21 Id. 241; Zollman v. Moore, 21 Id. 313; Campbell v. Texas etc. R. R., 2 Woods, 263. *Against an unrecorded defeasance.*—Knight v. Dyer, 57 Me. 174; Cogan v. Cook, 22 Minn. 137; Hart v. Farm. & Mech. B'k, 33 Vt. 252; Bailey v. Myrick, 50 Me. 171; Newton v. McLean, 41 Barb. 285; Koons v. Grooves, 20 Iowa, 373. See, however, Corpman v. Baccastow, 84 Pa. St. 363. *Against an unrecorded mortgage.*—Parker v. Jones, 57 Ga. 204; Saffold v. Wade's Ex'r, 51 Ala. 214; Williams v. Beard, 1 S. C. 309. *Purchasers of chattels when protected.*—Reed v. Gannon, 3 Daly, 414 (trustee to whom personal property had been conveyed by a marriage settlement, protected against a prior unrecorded mortgage of the same chattels given by the husband); Sloeper v. Chapman, 121 Mass. 404 (*bona fide* assignee of a chattel mortgage, given in fraud of mortgagor's creditors, protected as against such creditors). Thorndike v. Hunt, 3 De G. & J. 563

acquires the legal estate as against the mortgagor. In other states, although mortgages create only an equitable lien, they are expressly embraced within the recording acts.[1] The doctrine is also extended, in many of the states at least, to assignments of mortgages; the assignment being regarded as a "conveyance," and the assignee as a "purchaser." It should be observed, that the effect of a *bona fide* purchase and a previous registration, is applied not only between successive assignees of the mortgage from the same assignor, but also between such an assignee and a third person who has obtained some title, estate, or interest in or lien upon the mortgaged premises.[2]

§ 768. **Purchaser First of an Equitable Estate, Subsequently Acquires the Legal Estate: Tabula in Naufragio.**—The protection is not confined to a defendant who obtained the legal title contemporaneously with his original purchase. It includes those cases, where of several successive purchasers holding equitable estates, one of them later in time has obtained an outstanding legal estate. By far the most frequent instance in England is that of three or more successive mortgagees by conveyance, A., B., and C., where the first only would obtain the legal estate and the others an equitable one. If C. at the time of loaning his money and taking his mortgage had no notice of B.'s prior incumbrance—that is, was a *bona fide* purchaser of the equitable estate—on afterwards learning of B.'s claim, he may buy in or procure a transfer of A.'s mortgage to himself, and may thus put himself in a position of perfect defense against the enforcement of B.'s lien; he thus acquires, in fact, not only a defense to any suit brought by B., but the absolute precedence over B. in the satisfaction of the liens out of the mortgaged premises.[3] This particular application of the

[1] Haynsworth v. Bischoff, 6 Rich. (S. C.) 159; Porter v. Green, 4 Iowa, 571; Seevers v. Delashmutt, 11 Id. 174; Willoughby v. Willoughby, 1 T. R. 763, *per* Lord Hardwicke.

[2] Westbrook v. Gleason, 79 N. Y. 23, 30, 31; Fort v. Burch, 5 Denio, 187; St. John v. Spalding, 1 T. & C. 483; Farmers' Nat. B'k v. Fletcher, 44 Iowa, 252; and see *ante*, §§ 733, 734, and cases cited.

[3] The leading case in which this rule was formulated is Brace v. Duchess of Marlborough, 2 P. Wms. 491. Sir Joseph Jekyll said: "1st. That if a third mortgagee buys in the first mortgage, though it be pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this Lord Ch. J. Hale called a *plank* gained by the third mortgagee, or *tabula in naufragio*, which construction is in favor of a purchaser, every mortgagee being such *pro tanto*. * * * * 6th. His honor said in all these cases it must be intended that the *puisne* mortgagee, *when he lent his money*, had no notice of the second mortgage." In the earlier case of Marsh v. Lee, 2 Ventris, 337; 1 Cas. in Chan. 162, decided in 1670, the same rule was recognized, and Ch. Baron Hale used the figure *tabula in naufragio*, which has since been con-

doctrine to successive mortgages is known in the English equity as the rule concerning "tacking," a rule which has been universally rejected by the courts of the various states.

§ 769. **Extent and Limitations of this Rule.**—The doctrine under consideration has not been confined to mortgagees. It is fully settled in England that a *bona fide* purchaser of an equitable estate, without notice of a prior conflicting equitable interest, may, even on afterwards discovering the same and the consequent defect of his own title, protect himself against such claimant by procuring a conveyance to himself of the outstanding legal estate; subject, however, to this important exception, that if the prior claimant is a *cestui que trust*, and the title of the purchaser is thus subject to a trust either express or implied, he can not after notice of *such a defect* protect himself by acquiring the legal estate from the trustee.[1] Even where the *bona fide* purchaser has the best right to call for the legal estate, but has not yet actually obtained it, he is protected against the prior equitable claimant.[2]

§ 770. **The Purchaser Acquires the Legal Estate from a Trustee.**—The exception already mentioned is no less firmly settled. It has already been seen that one who obtains the legal title at the time of and as a part of his original purpose, may acquire his estate from a trustee in derogation of the trust; but if he purchases in good faith and for value and without notice, he will be protected against the claims of the beneficiary, and hold the property free from the trust; and this effect extends in equity, not only to conveyances of land, but to transfers of all kinds of personal property.[3] The following are the four possible conditions of fact: (1) Both the trustee and the

stantly repeated. See also S. C., 1 Eq. Lead. Cas. 837 (4th Am. ed.), Eng. note; Young v. Young, L. R., 3 Eq. 801; Pease v. Jackson, L. R., 3 Ch. 576; Prosser v. Rice, 28 Beav. 68; Bates v. Johnson, Johns. 304. Although the doctrine applied to successive mortgages, as stated in the text, forms that peculiar rule known to English equity as "tacking," and has been completely rejected by the courts of this country as both inequitable and impossible under our registry system, yet these and similar cases are sometimes quoted as authority upon the general proposition that the purchaser of a subsequent equity may protect himself by obtaining the legal title. I doubt their authority in this country upon that general question.

[1] The English cases in support of the above proposition are numerous. The following are some of the more recent: Pilcher v. Rawlins, L. R., 7 Ch. 259; 11 Eq. 53; Carter v. Carter, 3 K. & J. 617; Young v. Young, L. R., 3 Eq. 801; Jones v. Powles, 3 My. & K. 581; Prosser v. Rice, 28 Beav. 68; Pease v. Jackson, L. R., 3 Ch. 576.

[2] Willoughby v. Willoughby, 1 T. R. 763, *per* Lord Hardwicke; Charlton v. Low, 3 P. Wms. 328; *Ex parte* Knott, 11 Ves. 609; Tildesley v. Lodge, 3 Sm. & Giff. 543; Bowen v. Evans, 1 Jo. & Lat. 178, 264; Shine v. Gough, 1 Ball. & B. 436.

[3] Thorndike v. Hunt, 3 De G. & J. 563; Dawson v. Prince, 2 Id. 41.

purchaser might at the time of the conveyance be aware of the trust, and therefore of its violation by the conveyance. Here the purchaser would clearly obtain no title, and the trustee himself would be responsible. (2) Both might be ignorant of the trust. This case is barely *possible*, but very improbable. If it should occur the purchaser would clearly be protected. (3) The trustee might be ignorant and the purchaser have knowledge. This case, so far as it relates to the trustee's ignorance, is improbable; but the purchaser would plainly obtain no secure title. (4) The trustee might have knowledge and the purchaser be ignorant. This is a more common case. The purchaser being *bona fide* would obtain the title, but the trustee would be responsible personally for his violation of duty. When we pass to the other condition, of the purchaser of an equitable estate seeking to obtain protection by getting in the legal title, it is clear that two of the foregoing cases could not exist. The very question assumes that the purchaser has discovered the defect in his own title, and has therefore become aware of the trust, and that a conveyance to himself by the trustee would be a violation of the trust, and of the rights of the prior and opposing *cestui que trust*. The only two possible cases, therefore, are: (1) The trustee and the purchaser both aware of the trust. (2) The trustee ignorant and the purchaser aware. The latter is not probable, but is possible. The foregoing considerations show that in both of these cases the purchaser would not be protected; taking the legal estate from the trustee with notice of the existing trust, he would himself become a trustee. In this conclusion the decisions are unanimous, holding that the purchaser without notice and for value of an equitable estate, can not after notice protect himself and defeat the claims of the prior beneficial owner by getting a conveyance of the legal title from the trustee.[1]

§ 771. **The Rule as Applied in the United States.**—Although the modes of dealing with real property in the United States are entirely unlike those prevailing in England, and although the forms and species of the estates created and the circumstances of the transactions coming before the American judges are very different from those passed upon by the English chancellor, yet the courts of this country have recognized and

[1] Saunders v. Dehew, 2 Vern. 270; 272; Baillie v. McKewan, 35 Beav. Willoughby v. Willoughby, 1 T. R. 177; Sharples v. Adams, 32 Id. 763, 771; Carter v. Carter, 3 K. & J. 213; Colyer v. Finch, 19 Id. 500; 617, 642; Allen v. Knight, 5 Hare, 5 H. L. Cas. 905.

adopted the foregoing doctrines, and have applied them when necessary to analogous cases, and under analogous conditions of fact. Indeed, the defense of *bona fide* purchase has sometimes been pushed to an extent, as it seems, not warranted by the established doctrines. It has been made to embrace, not only those who have purchased equitable *estates* by means of conveyances purporting to transfer the whole title, but even to those who have intentionally acquired a mere *equitable interest or lien* by executory contract or otherwise, knowing that the legal estate was held by another, and who, upon afterwards discovering a prior and conflicting equity in favor of a third person, have taken a conveyance of that legal estate. I have already discussed the subject with some care, have examined American authorities, and have stated those conclusions which seem to be sustained by settled principles. It is unnecessary to repeat the discussion, and I simply refer to those paragraphs.[1]

§ 772. **And as Modified by the Recording Acts.**—There may be modifications of these results produced by the peculiar language of recording acts. In some of the states the statutes provide for the registration, not only of deeds, mortgages, and assignments, but also of every species of instrument which can affect land titles, or create any equitable interest in or lien upon land—including executory contracts for the sale of land. Such statutes must necessarily modify the operation of equitable doctrines originally applicable to an entirely different condition. If, where these enactments exist, the owner of land gives a contract for its sale to A., and afterwards gives a like contract to B., both vendees being equally meritorious, and A.'s contract is not recorded, while B., without notice, puts his agreement upon record, B. undoubtedly obtains a precedence by his record; and, if he subsequently learns of A.'s prior claim, he can take a conveyance of the legal estate from the vendor and legal owner. and completely protect himself by an earliest record thereof. In like manner, if A., the legal owner of land, gives a contract of sale to B., and this vendee executes a deed purporting to convey the land to C., and afterwards executes a like deed to D., both grantees being equally meritorious, and C.'s deed is unrecorded, but D. without notice puts his upon record, then D., although acquiring only an equitable interest by his conveyance, would undoubtedly gain the precedence over C. When D. subsequently learns of C.'s prior claim, he can take a conveyance of the legal estate from A., and by a first record of

[1] See *ante*, §§ 740, 741, 756.

that conveyance can place himself in a position of complete protection. These results seem to flow necessarily from the statute, but they are due entirely to the peculiar statutory provisions.[1]

§ 773. **And as Applied in this Country to Purchasers Acquiring the Legal Estate from a Trustee.**—The instances of a purchaser's attempting to obtain protection by means of the legal estate acquired from a trustee, are much less frequent in this country than in England. There are the two quite distinct cases of the purchaser who acquires the legal estate at the time of his original purchase, and the purchaser of an equitable interest who afterwards gets in the legal estate for his protection. The first of these cases would be presented where a *cestui que trust* sold and assigned or conveyed to A., and afterwards sold and conveyed the same interest to B., who, at the same time and as a part of the same transaction, received a conveyance also from the trustee. There are decisions which hold that a purchaser, who, like B. in the above supposition, intentionally takes a transfer from a *cestui que trust* of his interest, knowing that he *is* a *cestui que trust*, is necessarily charged with notice of any and all defects and infirmities in his grantor's title, and buys subject to any prior outstanding interest in another person A., which had been created by his grantor, and can not, at the same time, and as a part of the same transaction, obtain a deed from the trustee, and protect himself thereby. His title would be subject to the prior equities of A., notwithstanding his earliest registration of his own conveyances.[2] Other decisions do not apply the doctrine of constructive notice so severely, and would regard the second purchaser, under these circumstances, as protected by the legal estate obtained from the trustee without notice.[3] Passing to the second case, if, under circumstances similar to those supposed above, a *cestui que trust* has sold and transferred his interest or part of it to A., and afterwards makes a like sale and transfer to B., who pays value and has no notice of A.'s rights, but knows that his grantor is a *cestui qui trust*, and intentionally purchases his interest *as an equitable one*, and afterwards, on discovering A.'s prior claim, procures a conveyance of the legal estate from the trustee, in accordance with the doctrines as settled by courts of the highest authority, he can

[1] Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25; U. S. Ins. Co. v. Shriver, 3 Id. 381; Bellas v. McCarty, 10 Watts, 13.

[2] Sergeant v. Ingersoll, 7 Barr. 340; 3 Harris, 343; and see Kramer v. Arthurs, 7 Barr, 165, *per* Gibson, C. J.

[3] Flagg v. Mann, 2 Sumn. 486, 560; Vattier v. Hinde, 7 Pet. 252, 271.

not rely upon the legal title as a protection against A. The same must be true, and upon the same principle independently of peculiar recording acts, of a second vendee, who enters into his contract in good faith, but afterwards discovers that another vendee claims under a prior contract, and thereupon obtains the first conveyance of the legal estate from their common vendor; and of a second grantee from the vendee under an executory contract, who, upon discovering a prior grant to another person by the same vendee, procures a deed of the legal estate from the vendor in whom the legal title was vested.[1]

§ 774. **Other Instances: Purchaser at Execution Sale; Assignee of Thing in Action.**—Among the other instances in which the general doctrine has been applied, and the defense sustained, by the American courts, the following are some of the most important. Where a person becomes a *bona fide* purchaser of land at execution sale, and perfects his purchase by receiving the sheriff's deed, he stands in the same position as any other purchaser in good faith without notice who acquires the legal estate; he takes the land free from any unrecorded mortgage or other equitable interest or lien not appearing of record, which would have affected the land in the hands of the judgment debtor, and of which the judgment creditor might even have had notice.[2] An assignee in good faith of shares of stock, who has perfected his title by a surrender of the certificate, the issue of a new one to himself, and an entry upon the transfer books of the company, is generally treated as a *bona fide*

[1] See *ante*, §§ 740, 756; Sumner v. Waugh, 56 Ill. 531, 539; Flagg v. Mann, 2 Sumner, 486, 518; Bellas v. McCarty, 10 Watts, 13; Zollman v. Moore, 21 Gratt. 313.

It is held that a vendee in possession under a land contract, who buys in a title superior to that of his vendor's, can not claim the protection of a *bona fide* purchaser, but must hold the title for the benefit of his vendor. Lewis v. Boskins, 27 Ark. 61; Peay v. Capps, 27 Id. 160.

[2] See *ante*, § 724; Orth v. Jennings, 8 Blackf. 420; Siemon v. Schurck, 29 N. Y. 598; Jackson v. Chamberlain, 8 Wend. 620, 625; Jackson v. Post, 15 Id. 588; 9 Cow. 120; Gouverneur v. Titus, 6 Paige, 347; Den v. Rickman, 1 Green, 43; Rodgers v. Gibson, 4 Yeates, 111; Heister v. Fortner, 2 Binney, 40; Morrison v. Funk, 23 Pa. St. 421; Stewart v. Freeman, 10 Harris, 120, 123; Kellam v. Janson, 5 Id. 467; Mann's Appeal, 1 Barr, 24; Wilson v. Shoenberger, 10 Casey, 121; Scribner v. Lockwood, 9 Ohio, 184; Paine v. Mooreland, 15 Id. 435; Runyan v. McClellan, 24 Ind. 165; Ehle v. Brown, 31 Wisc. 405; Rogers v. Hussey, 36 Iowa, 664; Draper v. Bryson, 26 Mo. 108; Harrison v. Cachelin, 23 Id. 117; Waldo v. Russell, 5 Id. 387; Ohio etc. Co. v. Ledyard, 8 Ala. 866; Cooper v. Blakey, 10 Ga. 263; Miles v. King, 5 S. C. 146; Ayres v. Duprey, 27 Tex. 593, 605. As to the effect of purchase at execution sale by the judgment creditor himself, see Gower v. Doheny, 33 Iowa, 36, 39; Halloway v. Platner, 20 Id. 121; but *per contra*, Arnold v. Patrick, 6 Paige, 310, 316; Dickerson v. Tillinghast, 4 Id. 215; Wright v. Douglass, 10 Barb. 97; Sargent v. Sturm, 23 Cal. 359; Orme v. Roberts, 33 Tex. 768; Ayres v. Duprey, 27 Id. 593.

purchaser; and the protection has sometimes been extended to a transferee who has not taken these steps for the completion of his legal title. The defense has in like manner been applied to the assignee in good faith of other things in action.[1]

§ 775. **III. Suits by the Holder of an "Equity."**—In all the instances of the preceding subdivision, the plaintiff has held some equitable estate or interest in or lien upon the property, which he has sought to establish or enforce against the very subject-matter, either by perfecting his title and ownership, or by subjecting it to his incumbrance. The defense of *bona fide* purchase is not confined to such plaintiffs; it avails also against parties who claim to have some "equity" as distinguished from an equitable estate or interest—parties, that is, who simply claim and are seeking to obtain some peculiar equitable remedy, such as reformation or cancellation, and the like. In this respect the defense is a protection alike to defendants who have a legal estate, and those who have purchased an equitable interest.[2]

§ 776. **Suits for Relief against Accident or Mistake.**—Thus as against a subsequent *bona fide* purchaser for value, a court of equity will not relieve a prior party on the ground of accident or mistake, by granting a remedy otherwise appropriate, such as setting aside a conveyance, which had been executed by the plaintiff under a mistake or ignorance of his rights, or correcting an instrument executed under a mistake of fact.[3]

[1] See *ante*, §§ 698 (n.), 701, 712, 713, 715. Stocks: Pratt v. Taunton etc. Co., 123 Mass. 110, 112; Loring v. Salisbury Mills, 125 Id. 138; Pratt v. Boston etc. R. R., 126 Id. 443; Machinists' Nat. B'k v. Field, 126 Id. 345; Sewall v. Boston Water Works, 4 Allen, 277; Bank v. Lanier, 11 Wall. 369; Telegraph Co. v. Davenport, 7 Otto, 369; Morris etc. Co. v. Fisher, 1 Stockt. Ch. 667; Mt. Holly Co. v. Ferree, 17 N. J. Eq. 117; B'k of Commerce's App., 73 Pa. St. 59, 64; Craig v. Vicksburg, 31 Miss. 216; Brewster v. Sime, 42 Cal. 139, 147; Thompson v. Toland, 48 Id. 99; Winter v. Belmont M. Co., 53 Id. 428, 432; People v. Elmore, 35 Id. 653. Where assignee obtains possession: Ancher v. B'k of England, Dough. 637, 639; Wells v. Archer, 10 S. & R. 412; Ellis v. Kreutzinger, 27 Mo. 311. Where assignee of any thing in action perfects his legal title: Fitzsimmons v. Ogden, 7 Cranch, 1, 18; Judson v. Corcoran, 17 How. 612; Downer v. The Bank, 39 Vt. 25, 29. And generally that *bona fide* assignee is protected: Livingston v. Dean, 2 Johns. Ch. 478; Murray v. Lylburn, 2 Id. 441; Bloomer v. Henderson, 8 Mich. 395, 402; Croft v. Bunster, 9 Wisc. 503, 508; Moore v. Holcombe, 3 Leigh, 597; Ohio Life Ins. Co. v. Ross, 2 Md. Ch. 25, 39; Sleeper v. Chapman, 121 Mass. 404. But see §§ 708, 709, 714, and cases cited.

[2] Phillips v. Phillips, 4 De G. F. & J. 208, 218, *per* Lord Westbury; St. John v. Spalding, 1 T. & C. 483 (a *bona fide* assignee of a recorded mortgage, who had also recorded his assignment, was held unaffected by a prior unrecorded agreement by which the mortgage was satisfied).

[3] Bell v. Cundall, Ambl. 102; Malden v. Menil, 2 Atk. 8; Warrick v. Warrick, 3 Id. 291, 293; Harvey v. Woodhouse, Sel. Cas. Chan. 80; Marshall v. Collett, 1 Y. & C. Exch. 232, 238; Penny v. Watts, 2 De G. & Sm. 501; S. C., 1 Macn. & G. 150 (reversed

§ 777. **Suits for Relief against Fraud upon Creditors or between Parties.**—The same is true with respect to the remedy of cancellation, in suits to set aside conveyances or sales on account of fraud, either as against the creditors of the grantor, or against the grantor himself. In the first case, where a conveyance has been made with intent to defraud creditors of the grantor, so that it would be voidable as against the grantee, but this grantee has in turn conveyed to a *bona fide* purchaser for value, the remedial rights of the creditors to have the original and fraudulent transfer set aside are then cut off, and the purchaser has a complete defense against their claims.[1] In the second case of fraud between the parties, where a conveyance has been obtained by the grantee's fraud, so that it would be set aside at the suit of the defrauded grantor, but the fraudulent grantee has in turn conveyed to a *bona fide* purchaser for value and without notice, the latter will take and hold the property free from all these equities, protected against the equitable remedies of the original defrauded owner.[2]

§ 778. **Fraudulent Sales of Chattels.**—The defense has been extended to fraudulent sales of chattels under the following limitations, which it may be proper to state, although the rules belong to the law rather than to equity. If the vendor, induced by fraud, sold and delivered possession, and by the contract *intended to transfer the property as well as the possession* to the fraudulent vendee, and if this vendee, before the vendor has disaffirmed, should transfer the goods to an innocent purchaser for a valuable consideration and in good faith, the rights of such purchaser would be superior to those of the original vendor.

on the facts, but the law of the decision below not disturbed); Ligon v. Rogers, 12 Ga. 281, 292; Whitman v. Weston, 30 Me. 285.

[1] Bean v. Smith, 2 Mason, 252, 272–282; Wood v. Mann, 1 Sumn. 506; Fletcher v. Peck, 6 Cranch, 87, 133, 134; Erskine v. Decker, 39 Me. 467; Hart v. The Bank, 33 Vt. 252; Poor v. Woodburn, 25 Id. 234, 236; Hubbell v. Currier, 10 Allen, 333; Rowley v. Bigelow, 12 Pick. 307; Frazer v. Western, 1 Barb. Ch. 220; Ledyard v. Butler, 9 Paige, 132; Anderson v. Roberts, 18 Johns. 515, reversing 3 Johns. Ch. 371, 377; Phelps v. Morrison, 24 N. J. Eq. (9 C. E. Green), 195; Hood v. Fahnestock, 8 Watts, 489; Price v. Junkin, 4 Id. 85; Boyce v. Waller, 2 B. Mon. 91; Spicer v. Robinson, 73 Ill. 519; Henderson v. Henderson, 55 Mo. 534; Sydnor v. Roberts, 13 Tex. 598; Reed v. Smith, 14 Ala. 380; Collins v. Heath, 34 Ga. 443; Coleman v. Cocke, 6 Rand. 618; Sleeper v. Chapman, 121 Mass. 404 (a chattel mortgage given in fraud of the mortgagor's creditors, but assigned to a *bona fide* purchaser).

[2] Sturge v. Starr, 2 My. & K. 195; Bowen v. Evans, 1 Jo. & Lat. 178, 263, 264; Gavagan v. Bryant, 83 Ill. 376; McNab v. Young, 81 Id. 11; Dickerson v. Evans, 84 Id. 451; Chicago etc. Co. v. Foster, 48 Id. 507; Fulton v. Woodman, 54 Miss. 158; Farmers' Nat. B'k v. Fletcher, 44 Iowa, 252; Hurley v. Osler, 44 Id. 642; Henderson v. Henderson, 55 Mo. 534; Rowley v. Bigelow, 12 Pick. 307; Williamson v. Russell, 30 Conn. 406; Root v. French, 13 Wend. 570; Mears v. Waples, 3 Houst. 581.

If, however, it was not the intention of the original vendor to pass the property to the fraudulent vendee, *but only the possession*, such vendee could not transfer any property in the goods even to an innocent purchaser, and the original vendor could still assert his title. Finally, if under the circumstances first described, the fraudulent vendee should transfer the goods to a third person, who had actual or constructive notice, or who did not pay value, the original vendor could still rescind and assert his ownership.[1]

§ 779. **Fourth. Affirmative Relief to a Bona Fide Purchaser.**—The peculiar theory upon which equity acts towards a *bona fide* purchaser, seems of necessity to imply that he should be a defendant. There are a few special circumstances, however, in which the theory, consistently followed out, requires that he should be aided by affirmative relief. When these circumstances are carefully examined, it will be found that the fraud, or what equity regards as fraud, of the party holding the prior title or interest, and against whom the affirmative relief is granted, is usually if not always the ground upon which the court interposes on behalf of the subsequent *bona fide* purchaser. The following are the important instances of such relief.

§ 780. **Same. Illustrations.**—When a person, A., having a prior title to property, and knowing of such title, actively encourages another person, B., to buy the same property, concealing or not disclosing his own interest, but leading B. to suppose that he is obtaining a valid title; or when, under the same circumstances, A. being informed of B.'s intention, and being brought in contact with and made cognizant of the transaction, he simply keeps silence and permits B. to buy; in either case, B., being a *bona fide* purchaser for value and without notice, can compel a conveyance or release by A., of whatever estate, title, or interest the latter has. This relief will be

[1] Stevenson v. Newnham, 13 C. B. 285; Kingsford v. Merry, 11 Exch. 577; Pease v. Gloahec, L. R., 1 P. C. 219; Oakes v. Turquand, L. R., 2 H. L. 325; Root v. French, 13 Wend. 570; Caldwell v. Bartlett, 3 Duer, 341; Keyser v. Harbeck, 3 Id. 373; Brower v. Peabody, 13 N. Y. 121; Fassett v. Smith, 23 Id. 252; Hathorne v. Hodges, 28 Id. 486; Spraights v. Hawley, 39 Id. 441; Paddon v. Taylor, 44 Id. 371; Kinney v. Kiernan, 49 Id. 164; Weaver v. Barden, 49 Id. 286; Devoe v. Brandt, 53 Id. 462; Manning v. Keenan, 73 Id. 45; Stevens v. Brennan, 79 Id. 254; Robinson v. Dauchy, 3 Barb. 20; Pearse v. Pettis, 47 Id. 276; Spaulding v. Brewster, 50 Id. 142; Barnard v. Campbell, 65 Id. 286; Joslin v. Cowee, 60 Id. 48; Roberts v. Dillon, 3 Daly, 50; Field v. Stearns, 42 Vt. 106; Poor v. Woodburn, 25 Id. 234; Hodgeden v. Hubbard, 18 Id. 504; Decan v. Shipper, 11 Casey, 239; Jackson v. Summerville, 1 Harris, 359; Dean v. Yates, 22 Ohio St. 388; Sargent v. Sturm, 23 Cal. 359; Rison v. Knapp, 1 Dillon, 186, 201.

granted even though A. was an infant or a married woman, since it does not depend upon a capacity to contract, but upon unrighteous conduct.[1]

§ 781. **Same. Illustrations.**—The second important class of cases in which relief may be given to the *bona fide* purchaser, is that of incumbrancers who have misled the purchaser by their words or acts. If a prior incumbrancer, upon being inquired of by one intending to purchase the property, deny the existence of his incumbrance, a court of equity will certainly grant affirmative relief to the *bona fide* purchaser who has thus been misled, either by postponing or by completely setting aside the incumbrance, as the circumstances may require.[2] Mere silence of an incumbrancer does not render him liable, where he has no connection with the transaction in which the purchaser is engaged, is not brought into any relations with the parties, and is not placed under any equitable obligation to make disclosure.[3]

§ 782. **Same. Illustrations.**—In the two foregoing classes of cases the one who makes himself subject to an equity in favor of the *bona fide* purchaser, has knowledge or at least notice of the title or incumbrance with respect to which he incurs liability, or against which the purchaser obtains relief;

[1] Savage v. Foster, 9 Mod. 35. In the following cases the doctrine has been applied to estates in land, trust funds, things in action, and other forms of interests, in some defensively, in others as the ground of affirmative relief: Sharpe v. Foy, L. R., 4 Ch. 35 (infant married woman); *In re* Lush's Trusts, L. R., 4 Ch. 591 (married woman); Overton v. Banister, 3 Hare, 503 (infant *cestui que trust*); Nicholson v. Hooper, 4 My. & Cr., 179, 185, 186 (assignment of things in action); Hobbs v. Norton, 1 Vern. 136; Watts v. Hailswell, 4 Bro. Ch. 507, n.; Berrisford v. Milward, 2 Atk. 49; Thompson v. Simpson, 2 Jo. & Lat. 110; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Niven v. Belknap, 2 Johns. 573; Cheeney v. Arnold, 18 Barb. 434; Wells v. Pierce, 7 Fost. 503; Carr v. Wallace, 7 Watts, 394; Vanhorn v. Frick, 3 Serg. & R. 278; Saunderson v. Ballance, 2 Jones Eq. 322; Higgins v. Ferguson, 14 Ill. 269; Godeffroy v. Caldwell, 2 Cal. 489. If a misrepresentation as to his age is made by an infant to a person who knows his actual age, and can not be misled thereby, the infant will not become bound in equity with respect to such misstatement. Nelson v. Stocker, 4 De G. & J. 458.

[2] Ibbottson v. Rhodes, 2 Vern. 554; Hickson v. Aylward, 3 Molloy, 1; and see Boyd v. Belton, 1 Jo. & Lat. 730. Of course the denial need not be express and positive; any language which would fairly mislead the purchaser, and convince him that there was no lien, would be sufficient to raise this equity. For the same reason, where a trustee, who holds the legal title, is inquired of by one who intends to purchase from or deal with the *cestui que trust*, and states that the property is unincumbered, he will be held liable to the purchaser with respect to any incumbrance which does exist, provided he had received notice; but the trustee's statements must be clear and unmistakable in their meaning. Burrows v. Lock, 10 Ves. 470, 475; Slim v. Croucher, 1 De G. F. & J. 518; 2 Giff. 37 (forgetfulness no excuse); *In re* Ward, 31 Beav. 1; Stephens v. Venables, Id. 124.

[3] Idem; Osborn v. Lea, 9 Mod. 96, and cases cited under the next paragraph.

but the doctrine has been carried one step further. Where a person is actually ignorant of his own right in certain property, but under such circumstances that he might have had notice of it, or ought with reasonable care to have known of it, and he makes a representation untrue in fact to one intending to deal concerning the property, and this party relying upon the statement becomes a *bona fide* purchaser, equity will relieve such purchaser as against the one making the untrue representation, although no liability may be incurred at law.[1] The justice of this rule is plain, for equity often proceeds upon higher motives of morality than those which sometimes underlie legal rules. An innocent purchaser should not suffer loss from relying upon the untrue statements of another, although not made with an intent to mislead or deceive; in adjusting the loss between the two who are both innocent of an *intentional* wrong, equity properly lays it upon him who, by his acts or words, has made the loss possible.

§ 783. **Same. Removing a Cloud from a Title.**—In addition to the foregoing cases, all based upon an element of fraud, actual or constructive, affirmative relief may be granted to a

Teasdale v. Teasdale, Sel. Ch. Cas. 59; Pearson v. Morgan, 2 Bro. Ch. 388; Stiles v. Cowper, 3 Atk. 692; West v. Jones, 1 Sim. N. S. 205, 207, 208. In the last case, Lord Cranworth, V. C., said (p. 207): "The plaintiff relies on a principle perfectly familiar not only to courts of equity, but also to courts of law; namely, that where a party has, by words or conduct, made a representation to another leading him to believe in the existence of a particular fact or state of facts, and that other person has acted on the faith of such representation, then the party who made the representation shall not afterwards be heard to say that the facts were not as he represented them to be. This doctrine is not confined to cases where the original representation was fraudulent. Where, indeed, that is the case; where a party makes a representation which he knows to be false, in order thereby to induce another to act on the belief that it is true, and that other party does so act, the whole transaction is, in the strictest and most obvious and popular sense of the word, a fraud. But the doctrine not only of this court, but also of courts of law, goes much further. Even where a representation is made in the most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on, then, *prima facie*, the party making the representation is bound by it, as between himself and those whom he has thus misled." Where there is nothing but mere silence or acquiescence, equity requires that the party should be in such a position or relations to the others, that a duty to speak rested upon him, in order to create liability therefrom. Strong v. Ellsworth, 26 Vt. 366; Clabough v. Byerly, 7 Gill, 354. Where there is actual procurement, interference, inducement, representations actually untrue, although mistaken and without misleading intent, the principles so admirably explained by Lord Cranworth in the above extract, and stated in the text, must determine the liability. Richardson v. Chickering, 41 N. H. 380; Wells v. Pierce, 7 Fost. 503; Parker v. Barker, 2 Metc. 423; Laurence v. Brown, 5 N. Y. 304; Buchanan v. Moore, 13 Serg. & R. 304; McKelvey v. Truby, 4 W. & S. 323; Willis v. Swartz, 4 Casey, 413; Beaupland v. McKeen, 4 Id. 124; and see the peculiar case of McKelway v. Armour, 2 Stockt. Ch. 115.

bona fide purchaser, under some other circumstances, to remove a cloud upon his title; that is, to set aside judgments, mortgages, and the like, which are apparent liens, but in reality inoperative as against him, where the law would furnish no adequate remedy.[1]

§ 784. **Fifth. Mode and Form of the Defense.**—I shall conclude the discussion of this subject with a very brief consideration of the manner in which the *bona fide* purchaser may avail himself of the defense, the pleadings by which it may be set up, and the necessary contents of those pleadings. Under the system of procedure and pleading peculiar to a court of chancery, and in whatever tribunals that system is still preserved, the defense may be raised in three different manners. If the fact that the defendant is a *bona fide* purchaser for value without notice is clearly shown by the bill of complaint, the defendant may resort to a *demurrer*.[2] The usual mode of presenting the defense is by a plea; and if it contains the requisite averments, and they are established by evidence, the suit will be dismissed without the necessity of an answer on the merits. Instead of resorting to a "plea," the defendant may set out the facts constituting this defense in his answer.[3] If he neglects to put in a plea, and fails to insert the defense in his answer, he can not raise it or avail himself of it in any subsequent stage of the suit.[4] Wherever the reformed system of procedure prevails, and all remedies equitable as well as legal are obtained through the single "civil action," the defense must, of course, be taken advantage of either by demurrer or by answer. Unless the facts appear on the face of the complaint so as to permit a demurrer, there can be no doubt that, in the new system as well as in the old, the defense must be pleaded in order to be available.[5]

§ 785. **Necessary Allegations.**—The allegations of the plea, or of the answer so far as it relates to this defense, must

[1] Setting aside judgments: Martin v. Hewitt, 44 Ala. 418; Sharp v. Hunter, 7 Coldw. 389; Filley v. Duncan, 1 Neb. 134. Setting aside mortgages: Dillon v. Costelloe, 2 Moll. 512; Wallace v. Lord Donegal, 1 Dr. & Wal. 461; Gibson v. Fletcher, 1 Ch. Rep. 59.

[2] Mitf. on Eq. Pl. 199.

[3] With respect to the differences between a "plea" and an "answer," and the advantages of the former, see Att'y-Gen. v. Wilkins, 17 Beav. 285, 291; Lord Rancliffe v. Parkyns, 6 Dow, 149, *per* Lord Eldon; Lancaster v. Evors, 1 Phil. 349, 352; Ovey v. Leighton, 2 S. & S. 234; Earl of Portarlington v. Soulby, 7 Sim. 28.

[4] Phillips v. Phillips, 4 De G. F. & J. 208; Lyne v. Lyne, 8 De G. M. & G. 553; 21 Beav. 318.

[5] The defense seems plainly to be "new matter" within the meaning of the codes, and therefore to be specially pleaded, not being admissible under an answer of denials general or special.

include all those particulars which, as has been shown, are necessary to constitute a *bona fide* purchase. It should state the consideration, which must appear from the averment to be "valuable," within the meaning of the rules upon that subject, and should show that it has actually been paid and not merely secured.[1] It should also deny notice in the fullest and clearest manner, and this denial is necessary whether notice is charged in the complaint or not. The denial must correspond with the settled rules upon the subject of notice, so as to bring the case within the operation of those rules.[2] Concerning the foregoing averments, there has been, and can be, no doubt; there is, however, some confusion or even conflict with respect to the allegations concerning the defendant's estate. There are many English decisions which hold in the most positive manner, the following requirements. The defendant must allege that the grantor from whom he immediately took his title, was seised, or appeared to be seised, or pretended to be seised of a legal estate at the time of the conveyance, and also that such grantor was in possession if the conveyance purported to be of a present estate in possession. Consequently the defendant must allege that by the conveyance in question he either actually obtained a legal freehold estate, or else obtained what purported and appeared to be such an estate, and what he at the time purchased as, and supposed and believed to be, such a freehold legal estate—that he acquired a legal seisin from his immediate grantor. From these decisions it necessarily follows, that, while a defendant, who really acquires only an equitable estate, which, however, purported to be a legal estate, and which he in good faith believed to be such, may be a *bona fide* purchaser within the meaning of the doctrine, a defendant who knowingly and intentionally purchases an equitable estate or interest, can not avail himself of the defense. These English decisions have been followed by numerous American cases.[3] This is plainly

[1] See *ante*, subdivision on valuable consideration, cases cited under §§ 746–751. In England the pleading must show that the consideration has all been paid, etc. In this country the allegations on this subject may vary in different states, according to the particular rules prevailing therein, as shown in former paragraphs: but should conform to the rules as settled in the particular state.

[2] See *ante*, subdivision on notice, cases cited under §§ 752–756. In England the receipt of notice before the payment of the consideration and the execution of the conveyance must be denied, etc. As very different rules on the subject of notice, the time of giving it, etc., have been adopted in different states, the allegations must of course correspond to the rules prevailing in the particular state, as heretofore shown. The English cases on the subject of denying notice and alleging consideration, would be misleading in some of the states.

[3] Story v. Lord Windsor, 2 Atk. 630; Trevanion v. Mosse, 1 Vern. 246;

the same question, under another form, which has been discussed in the preceding subdivisions, How far the subsequent purchaser of a mere equitable interest is entitled to the defense of a *bona fide* purchaser? That discussion need not be renewed, and I simply refer to the paragraphs which contain it, and to the cases heretofore cited in which it is involved.[1] It should be remembered, however, in applying the doctrine, that it has been materially modified by the recording statutes. Whenever, as is commonly the case in this country, the defense of *bona fide* purchase arises in connection with recording, the true rule would seem to be as follows: The defendant must aver in his plea or answer that he has purchased an estate which comes within the protection of the recording acts; or, in other words, that he has purchased an estate or interest, legal or equitable, of such a kind that the conveyance or instrument constituting his muniment of title *must* or *may* be recorded, so that by his recording it, he can obtain the protection which the statutes give to such a *bona fide* purchaser who has first put his instrument of title on record.[2]

SECTION VIII.

CONCERNING MERGER.

ANALYSIS.

§ 786. Origin and nature of the doctrine.
§§ 787, 788. *First.* Merger of Estates.
§ 787. I. The legal doctrine.
§ 788. II. The equitable doctrine.
§§ 789–800. *Second.* Merger of charges.
§ 790. I. The owner of the property becomes entitled to the charge.
§ 791. Same: Intention prevents a merger.
§ 792. Time and mode of expressing the intention.

Hughes v. Garth, Ambl. 421; Page v. Lever, 2 Ves. 450; Dobson v. Leadbeater, 13 Id. 230; Jackson v. Rowe, 4 Russ. 514; Ogilvie v. Jeaffreson, 2 Giff. 353, 379; Lady Lanesborough v. Lord Kilmaine, 2 Moll. 403; Snelgrove v. Snelgrove, 4 Dessaus. Eq. 274 (a very full statement of all the requisites for a good plea, and a review of previous authorities); Blake v. Heyward, 1 Bailey Eq. 208; Bush v. Bush, 3 Strobh. Eq. 131; Brown v. Wood, 6 Rich. Eq. 155; Tompkins v. Anthon, 4 Sandf. Ch. 97; Baynard v. Norris, 5 Gill. 468; Nantz v. McPherson, 7 Mon. 597; Hunter v. Sumrall, 5 Litt. 62; Blight's Heirs v. Banks, 6 Mon. 198; Halstead v. B'k of K'y, 4 J. J. Marsh. 554; Larrowe v. Beane, 10 Ohio, 498; Jenkins v. Bodley, 1 Sm. & Mar. Eq. 338; Wailes v. Cooper, 24 Miss. 208; Boone v. Chiles, 10 Pet. 177; Vattier v. Hinde, 7 Id. 252, 271; Alexander v. Pendleton, 8 Cranch, 462.

[1] See *ante*, §§ 740, 756.

[2] See *ante*, §§ 757–761.

§ 793. Conveyance to the mortgagee; assignment to the mortgagor or to his grantee.
§ 794. Merger never prevented when fraud or wrong would result.
§ 795. Life tenant becomes entitled to the charge.
§ 796. 2. The owner of the land pays off a charge upon it.
§ 797. Owner in fee personally liable for the debt pays off a charge.
§ 798. Owner who is not liable for the debt pays off a charge.
§ 799. Life tenant pays off a charge.
§ 800. Priorities affected by merger.

§ 786. **Origin and Nature of the Doctrine.**—The applications of the equitable doctrine concerning merger, although resting upon the same general principle, are various in form, and some of them are of frequent occurrence in this country. The single principle from which the doctrine, in all its modes and forms of application, directly results, is the fruitful maxim that equity, in viewing the transactions of men, and in determining the rights and liabilities arising therefrom, looks at the *real intent* of the parties as constituting the essential substance, and not at the mere external form. In this method of viewing the affairs of mankind, equity often establishes different rules, creating different rights and duties from those which, under the same circumstances, prevail at law.[1] The equitable doctrine of merger is a striking illustration of this most righteous principle; and the whole discussion in fact consists in ascertaining when and how a merger, which would have been inevitable at law, will be prevented or not permitted in equity. The subject will be treated of under the two following divisions: (1) Merger of estates in the same land; (2) Merger of charges—liens and incumbrances—on the same land.

§ 787. **First. Merger of Estates. I. The Legal Doctrine.**—The rule of the common law is well established, and of almost universal application, that where a greater and a less legal estate, held in the same right, meet in the same person, without any intermediate estate, a merger necessarily takes place. The lesser estate ceases to exist, being merged in the greater, which alone remains; as where a tenant for years acquires the fee, the term is merged. For the purposes of a merger, by the common law, every estate of freehold is greater than any term of years. Both estates, however, must be held in the same right, in order that this result may follow.[2] There

[1] See *ante*, vol. 1, §§ 378–384. "Equity looks to the intent rather than to the form."

[2] 2 Black. Com. 177; 2 Spence Eq. Jur. 879, 880; White v. Greenish, 11 C. B. N. S. 209, 233; Jones v. Davies, 7 H. & N. 507; Lady Platt v. Sleap, Cro. Jac. 275. An estate for years will merge in a *reversionary* term of years, even though the latter is of

is a well-settled exception to this general rule in the case of estates tail; these do not merge in the fee, such result being prevented by the operation of the statute *de donis*.[1] Courts of law, under the influence of equitable notions, may now admit of some other exceptions.[2] The general doctrine is not confined to the union of two legal estates. Wherever in like manner a legal and an equal and co-extensive equitable estate, or a legal and a less equitable estate, meet in the same person, in either instance the equitable estate is merged at law, for the law regards the legal estate as the superior.[3] There is, however, the same exception as above, that an equitable estate tail will not merge in the legal fee.[4]

§ 788. **II. The Equitable Doctrine.**—Where the legal estate, for example, the fee, and an equal co-extensive equitable estate unite in the same person, the merger takes place in equity, in the absence of acts showing an intention to prevent it, as certainly and as directly as at the law. Under these circumstances merger is *prima facie* the equitable as well as legal rule.[5] If, however, the holder of an equitable estate obtains the legal fee, and procures it to be conveyed to a trustee with

less duration. See Hughes v. Robotham, Cro. Eliz. 302; Stephens v. Bridges, 6 Madd. 66. As illustrations of the general rule, see Welsh v. Phillips, 54 Ala. 309; Cary v. Warner, 63 Me. 571 (life estate and reversion in fee); Allen v. Anderson, 44 Ind. 395 (life estate and fee).

[1] 2 Black. Com. 177. Estates tail in copyholds, however, will merge in the fee, since they are not within the statute. Parker v. Turner, 1 Vern. 458; Dunn v. Green, 3 P. Wms. 9; also an estate tail after possibility of issue extinct, or when changed into a determinable fee, may merge. See 3 Preston on Convey. 240.

[2] Thus it is held in Malloney v. Horan, 49 N. Y. 111, that where the fee has been conveyed to A., by a deed fraudulent as against the creditors of the grantor, and the conveyance has been set aside on that ground, the fact that it was valid as between the immediate parties will not cause it to work a merger of a smaller prior estate held by the grantee A.; to the loss of the fee, the law will not add as a penalty the further loss of the prior estate on the ground of a merger.

[3] Selby v. Alston, 3 Ves. 339; Brydges v. Brydges, 3 Ves. 125a; Capel v. Girdler, 9 Id. 509; Welsh v. Phillips, 54 Ala. 309.

[4] Merest v. James, 6 Madd. 118; Browne v. Blake, 1 Molloy, 382.

[5] Selby v. Alston, 3 Ves. 339; Brydges v. Brydges, 3 Id. 125a; Wykham v. Wykham, 18 Id. 418, *per* Lord Eldon; James v. Morey, 2 Cow. 246. In Brydges v. Brydges, *supra*, Lord Alvanley laid down the equitable docirine in an accurate manner, which received the strong approval of Lord Eldon, and the decision is a leading authority: "I admit that where a person has the same interest in the legal and equitable estate, he ceases to have the equitable estate, and has the legal estate, upon which this court will not act, but leaves it to the rules of law. But it must always be understood with this distinction, that it holds only where the legal and equitable estates are co-extensive and commensurate; but I do not by any means admit that where a person has the whole legal estate, and a partial equitable estate, the latter sinks into the former, for it would be a disadvantage to him. There is no absurdity in saying that a person may have the whole legal estate, and a limited interest in the beneficial interest in that estate, as there is in saying that he has the whole legal fee and a legal remainder."

an express declaration that there shall be no merger, then it seems that a court of equity will not permit a merger in opposition to such a direct intention.[1] Where the owner of a legal estate, as for example the fee, acquires by purchase or in any other manner a lesser equitable estate not co-extensive and commensurate with his legal estate, or a lesser legal estate, a distinction exists; the merger although taking place at law does not necessarily take place in equity; indeed it may be said that the leaning of equity is then against any merger, and that *prima facie* it does not result. The settled rule of equity is that the intention of the one acquiring the two interests then controls. If this intention has been expressed by taking the transfer to a trustee, or by language inserted in the instrument of transfer, it will of course be followed. If the intention has not been thus expressed, it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all these circumstances to be for the benefit of the party acquiring both interests, that a merger shall not take place, but that the equitable or lesser estate shall be kept alive, then his intention that such a result should follow will be presumed, and equity will carry it into execution by preventing a merger, and by treating the equitable or lesser interest as subsisting, and by admitting all the consequences, for the protection of the party with respect to other matters, which necessarily result from the fact of the equitable estate being left in existence.[2]

[1] Belaney v. Belaney, L. R., 2 Ch. 138; Tiffin v. Tiffin, 1 Vern. 1. The rule in Shelley's case was so unfavorably regarded by courts of equity that they would not permit a merger of an equitable in a legal estate in order to render the life interest and the remainder of the same kind and thus let in the operation of the rule. See Shapland v. Smith, 1 Bro. Ch. 76; Lord Say and Seal v. Jones, 3 Bro. P. C. 113; Venables v. Morris, 7 T. R. 342–438; Silvester v. Wilson, 2 T. R., 444. No merger will take place in equity where the two interests are held by different rights. Chambers v. Kingham, L. R., 10 Ch. D. 743, 745.

[2] Brydges v. Brydges, 3 Ves. 125a; Chambers v. Kingham, L. R., 10 Ch. D. 743, 745; Thorn v. Newman, 3 Sw. 603; Adams v. Angell, L. R., 5 Ch. D. 634, 645, and cases cited; Forbes v. Moffatt, 18 Ves. 384; St. Paul v. Lord Dudley and Ward, 15 Id. 167, 173; Andrus v. Vreeland, 29 N. J. Eq. 394; Welsh v. Phillips, 54 Ala. 309; Fowler v. Fay, 62 Ill. 375; Worcester B'k v. Cheeney, 87 Id. 602; Hart v. Chase, 46 Conn. 207; Malloney v. Horan, 49 N. Y. 111; Binsse v. Paige, 1 Abb. App. Dec. 138; Sheehan v. Hamilton, 2 Keyes, 304; 4 Abb. App. Dec. 211. This case presents an interesting and most important question with respect to the application of the equitable doctrine in legal actions under the reformed procedure. The action was one to recover possession of land, simple ejectment, in which the plaintiff only alleged and sought to recover upon his legal title in his complaint. Livingston, the original owner, had demised the land to one Taylor by a perpetual lease, reserving a rent charge with a clause of re-entry. L. assigned this rent charge and all his rights to Dr. Clarke, who died in in 1846, and the plaintiff is his heir at law. The action is brought to recover the land on account of failure

The same rule may be stated in a negative form. If from all the circumstances a merger would be disadvantageous to the party, then his intention that it should not result will be presumed and maintained. The language of some American cases seems to state the rule so broadly that it would include an equitable interest co-extensive and commensurate with the legal estate, and would thus fail to recognize the distinction heretofore laid down. This may perhaps result from the fact that instances of a legal and an equitable fee uniting in the same person have very rarely come before the American courts for adjudication; and the judges, in stating the equitable doctrine correctly applicable to the facts before them, have naturally expressed it in terms somewhat broader than was necessary for the decision.[1]

§ 789. **Second. Merger of Charges.**—Whenever the owner of the legal estate in land becomes also the holder of any charge directly resting upon it, the latter merges at law and disappears, in the same manner as a lesser estate merges. The equitable doctrine preventing the merger under these circumstances, is even stronger and more readily applied than in the case of two estates. The "charges" referred to include mortgages, and other liens and incumbrances, and sometimes easements, servitudes, and similar interests which are not rights of property or estates. There are two principal conditions of fact to be considered: (1) Where the legal owner of the property becomes, by bequest, devolution, or transfer, holder of the charge; (2) Where the owner of the property voluntarily pays off the charge.

to pay the rent. The defense was as follows: Taylor had given a mortgage on the land, which had been foreclosed, and the land was bought in by Dr. Clarke in 1831, and was by him conveyed to one Risley and from him by mesne conveyances to the defendant. The defendant's contention was, that Dr. Clarke, being in 1831 owner both of the land and of the rent charge, the latter merged and was extinguished. In reply the plaintiff proved the intention of Dr. Clarke that the rent charge should not merge, but should be kept alive. The court below held that the doctrine of non-merger was purely equitable, and could not be invoked by the plaintiff in this legal action. The court of appeals, on the contrary, decided that in such a legal action, brought upon a legal title, and seeking a purely legal remedy, the plaintiff may still invoke the aid of an equitable right or title which he holds, and is no longer put to the necessity of establishing and enforcing such equitable right by a separate action in equity.

[1] If A. holding the equitable fee as a *cestui que trust* under a dry passive trust, should acquire directly to himself the legal fee, there can be no doubt upon the authorities that a merger would take place in equity as well as at law. This case, which is not infrequent in England, where such trusts are common, is very infrequent in the United States. The English authorities seem to hold very distinctly, that a mere expressed intention of the party would not prevent the merger.

§ 790. **I. The Owner of the Property becomes Entitled to the Charge.**—When the owner of the fee becomes absolutely entitled in his own right to a charge or incumbrance upon the same land, with no intervening interest or lien, the charge will at law merge in the ownership and cease to exist. Under like circumstances a merger will take place in equity where no intention to prevent it has been expressed, and none is implied from the circumstances and the interests of the party; and a presumption in such a case arises in favor of the merger.[1] Generally the same result follows whether a mortgagee assigns a mortgage to the mortgagor, or the mortgagor conveys the land to the mortgagee.[2] The merger of a charge or incumbrance under these circumstances is, however, in most instances only a presumption, which can generally be overcome, and which sometimes does not even arise.[3]

§ 791. **Same: Intention Prevents a Merger.**—The equitable doctrine concerning the merger where the owner of the fee becomes entitled to the charge or incumbrance, may be stated as follows, substantially in the language of most eminent judges. Sir William Grant says: "The question is upon the intention, actual or presumed, of the person in whom the interests are united." Sir George Jessel says: "In a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, with-

[1] Forbes v. Moffatt, 18 Ves. 384; Lord Compton v. Oxenden, 2 Id. 261, 264; Swinfen v. Swinfen, 29 Beav. 199; Byam v. Sutton, 19 Id. 556; Swabey v. Swabey, 15 Sim. 106; Tyler v. Lake, 4 Id. 351, 358; Brown v. Stead, 5 Id. 535; Grice v. Shaw, 10 Hare, 76; Smith v. Phillips, 1 Keen, 694; Baldwin v. Sager, 70 Ill. 503; Robins v. Swain, 68 Id. 197; Lilly v. Palmer, 51 Id. 331; Gardner v. Astor, 3 Johns. Ch. 53; Starr v. Ellis, 6 Id. 393; James v. Johnson, 6 Id. 417; James v. Morey, 2 Cow. 246, 286, 300, 313; Gregory v. Savage, 32 Conn. 250, 264; Bassett v. Mason, 18 Id. 131; Wilhelmi v. Leonard, 13 Iowa, 330.

[2] Id. Some recent cases draw a distinction as follows: If the mortgagee assigns the mortgage to the mortgagor, a merger is presumed; but if the mortgagor conveys the land to the mortgagee, especially where there is a subsequent incumbrance, a merger will not be presumed, but will depend upon the interest of the mortgagee as showing the intent. Stantons v. Thompson, 49 N. H. 272; Edgerton v. Young, 43 Ill. 464.

[3] There is some discrepancy between the earlier and more recent decisions. In Toulmin v. Steere, 3 Meriv. 210, 224, Sir William Grant said: "The cases of Greswold v. Marsham, 2 Ch. Cas. 170, and Mocatta v. Murgatroyd, 1 P. Wms. 393, are express authorities to show that one purchasing an equity of redemption can not set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice;" or, in other words, that the mortgage would always merge in equity. This dictum has been repeatedly disapproved by the ablest judges, and must be regarded as completely overthrown by modern decisions. See Adams v. Angell, L. R., 5 Ch. D. 634, 641, 645, and cases cited.

out any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee pays off or becomes entitled to a charge, the presumption is the other way, but he can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then equity will, in the absence of any declaration of his intention, destroy it; *but if there is any reason for keeping it alive*, such as the existence of another incumbrance, *equity will not destroy it.*" In short, where the legal ownership of the land and the absolute ownership of the incumbrance become vested in the same person, the intention governs the merger in equity. If this intention has been expressed, it controls; in the absence of such an expression, the intention will be presumed from what appear to be the best interests of the party as shown by all the circumstances; if his interests require the incumbrance to be kept alive, his intention to do so will be inferred and followed; if, on the contrary, his best interests are not opposed to a merger, then a merger will take place according to his supposed intention. This is the general rule, subject, however, to one important exception to be mentioned in a subsequent paragraph.[1] If the person expressly

[1] Forbes v. Moffatt, 18 Ves. 384, *per* Sir Wm. Grant; Adams v. Angell, L. R., 5 Ch. D. 634, 645, *per* Sir Geo. Jessel; Swabey v. Swabey, 15 Sim. 106; Grice v. Shaw, 10 Hare, 76; Bailey v. Richardson, 9 Id. 734, 736; Tyrwhitt v. Tyrwhitt, 32 Beav. 244; Swinfen v. Swinfen, 29 Id. 199; Davis v. Barrett, 14 Id. 542; Simonton v. Gray, 34 Me. 50; Given v. Marr, 27 Id. 212; Holden v. Pike, 24 Id. 427; Clark v. Clark, 56 N. H. 105; Stantons v. Thompson, 49 Id. 272; Hinds v. Ballou, 44 Id. 619; Moore v. Beasom, Id. 215; Drew v. Rust, 36 Id. 335; Bell v. Woodward, 34 Id. 90; Weld v. Sabin, 20 Id. 533; Bullard v. Leach, 27 Vt. 491; Walker v. Barker, 26 Id. 710; Slocum v. Catlin, 22 Id. 137; Evans v. Kimball, 1 Allen, 240, 242; New Eng. J. Co. v. Merriam, 2 Id. 390; Savage v. Hall, 12 Gray, 363; Grover v. Thatcher, 4 Id. 526; Loud v. Lane, 8 Met. 517, 518, 519; Brown v. Lapham, 3 Cush. 551; Hunt v. Hunt, 14 Pick. 374; Gibson v. Crehore, 3 Id. 475; 5 Id. 146; Knowles v. Carpenter, 8 R. I. 548; Mallory v. Hitchcock, 29 Conn. 127; Bassett v. Mason, 18 Id. 131; Lockwood v. Sturdevant, 6 Id. 373; Campbell v. Vedder, 1 Abb. App. Dec. 295; Purdy v. Huntington, 42 N. Y. 334; Hancock v. Hancock, 22 Id. 568; Judd v. Seekins, 62 Id. 266; Sheldon v. Edwards, 35 Id. 279; Bascom v. Smith, 34 Id. 320; Clift v. White, 12 Id. 519; Spencer v. Ayrault, 10 Id. 202; Vanderkemp v. Shelton, 11 Paige, 28; Skeel v. Spraker, 8 Id. 182; White v. Knapp, 8 Id. 173; Millspaugh v. McBride, 7 Id. 509; James v. Johnson, 6 Johns. Ch. 417, 423; Starr v. Ellis, 6 Id. 393; Gardner v. Astor, 3 Id. 53; Loomer v. Wheelwright, 3 Sandf. Ch. 135, 157; Angel v. Boner, 38 Barb. 425; McGiven v. Wheelock, 7 Id. 22; James v. Morey, 2 Cow. 246; Hoppock v. Ramsey, 28 N. J. Eq. 413; Mulford v. Petersen, 35 N. J. Law, 127; Duncan v. Smith, 31 Id. 325; Van Wagenen v. Brown, 26 Id. 196; Hinchman v. Emans, Saxt. Ch. 100; Duncan v. Drury, 9 Pa. St. 332;

declares his intention that the charge shall be kept on foot, no question can generally arise, for he can, with the single exception mentioned, always prevent a merger in this manner.[1] The presumption of an intent to preserve the incumbrance alive may, on the other hand, be inferred from the circumstances of the case, from the position of the owner's property, and especially from the fact that a merger would let in other charges or incumbrances.[2]

§ 792. **Time and Mode of the Intention.**—While the intention controls, it must be understood as the intention existing at the time the two interests came together. If there was then no intention to keep the incumbrance alive, a merger can not be prevented by an intention afterwards formed and expressed, or from a subsequent change of circumstances from which an intention might be inferred.[3] Where the intention is expressed,

Moore v. Harrisburg B'k, 8 Watts, 138; Wallace v. Blair, 1 Grant's Cas. 75; Polk v. Reynolds, 31 Md. 106; Bell v. Tenny, 29 Ohio St. 240; Jordan v. Forlong, 19 Id. 89; Tower v. Divine, 37 Mich. 443; Snyder v. Snyder, 6 Id. 470; Richardson v. Hockenhull, 85 Ill. 124; Baldwin v. Sager, 70 Id. 503; Huebsch v. Scheel, 81 Id. 281; Robins v. Swain, 68 Id. 197; Fowler v. Fay, 62 Id. 375; Clark v. Laughlin, Id. 278; Lilly v. Palmer, 51 Id. 331; Edgerton v. Young, 43 Id. 464; Aiken v. Milwaukee etc. R. R., 37 Wisc. 469; Webb v. Meloy, 32 Id. 319; Lyon v. McIlvaine, 24 Iowa, 9; Wilhelmi v. Leonard, 13 Id. 330; White v. Hampton, Id. 259; Davis v. Pierce, 10 Minn. 376; Christian v. Newberry, 61 Mo. 446; Grellet v. Heilshorn, 4 Nev. 526; Carter v. Taylor, 3 Head, 30; Besser v. Hawthorn, 3 Oreg. 129; Atkinson v. Morrissy, Id. 332; Knowles v. Lawton, 18 Ga. 476; Tucker v. Crowley, 127 Mass. 400; Delaware etc. Co. v. Bonnell, 46 Conn. 9; Hart v. Chase, Id. 207; N. J. Ins. Co. v. Meeker, 40 N. J. L. 18; Ætna Life Ins. Co. v. Corn, 89 Ill. 170; Meacham v. Steele, 93 Id. 135; Dunphy v. Riddle, 86 Id. 22; Worcester B'k v. Cheeney, 87 Id. 602; Smith v. Ostermeyer, 68 Ind. 432; Shimer v. Hammond, 51 Iowa, 401; Waterloo B'k v. Elmore, 52 Id. 541; Scott v. Webster, 44 Wisc. 185. The exception referred to in the text is the case where the owner of land who is primarily bound to pay the debt secured, pays off or takes an assignment of the mortgage. See *post*, § 797.

[1] Bailey v. Richardson, 9 Hare, 734, 736; Tyrwhitt v. Tyrwhitt, 32 Beav. 244.

[2] Swinfen v. Swinfen, 29 Beav. 199; Davis v. Barrett, 14 Id. 542; Tyrwhitt v. Tyrwhitt, 32 Id. 244; Stantons v. Thompson, 49 N. H. 272; Warren v. Warren, 30 Vt. 530; Hancock v. Hancock, 22 N. Y. 568; Campbell v. Vedder, 1 Abb. App. Dec. 295; Hill v. Pixley, 63 Barb. 200; Loud v. Lane, 8 Met. 517. To effect a merger in any case the person must be owner of the land and of the charge at the same time. If a mortgagee has assigned his mortgage and afterwards takes a conveyance of the land, there will be no merger, even though the assignment of the mortgage be not recorded. Campbell v. Vedder, 1 Abb. App. Dec. 295; Purdy v. Huntington, 42 N. Y. 334. A mortgage assigned to the wife of the mortgagor, will not merge under modern state statutes; Faulks v. Dimock, 27 N. J. Eq. (12 C. E. Green), 65; Model Lodg. H. Ass'n v. Boston, 114 Mass. 133; Bemis v. Call, 10 Allen, 512; Bean v. Boothby, 57 Me. 295; nor will the marriage of the mortgagor and mortgagee produce a merger. Power v. Lester, 23 N. Y. 527; and see Gillig v. Maass, 28 N. Y. 191. Taking a new mortgage on the same land, or other security, for the same debt, does not generally merge the old one. Christian v. Newberry, 61 Mo. 446.

[3] Cole v. Edgerly, 48 Me. 108; Given v. Marr, 27 Id. 212; Hunt v. Hunt, 14 Pick. 374, 383; Gardner v.

it may be by the manner in which the incumbrance is transferred, as to a trustee for the owner of the land, or by recitals or other language in the assignment of the security or conveyance of the land; no particular mode is requisite, provided the intention is sufficiently declared.[1] If there is no expression of an intention at the time, then all the circumstances will be considered in order to discover what is for the best interests of the party. He will be presumed to have intended that the charge should be kept alive or should merge according to the benefit resulting from either. If a merger would let in other incumbrances *which he was not already bound to pay*, this is a circumstance almost decisive of an intention not to permit a merger.[2] Parol evidence of all the surrounding circumstances of the transaction and of the property is therefore admissible for the purpose of discovering the intention, or to show that a merger must take place;[3] and also to show fraud;[4] but not to prove the intention directly.[5]

§ 793. **Conveyance to the Mortgagee; Assignment to the Mortgagor or to his Grantee.**—Where a mortgagee takes a conveyance of the land from the mortgagor or from a grantee of the mortgagor, if the transaction is fair, the presumption of an intention to keep the security alive is very strong. It is generally for the interests of the party in this position that the mortgage should not merge, but should be preserved to retain a priority over other incumbrances. As the mortgagee acquiring the land is not the debtor party bound to pay off either the

Astor, 3 Johns. Ch. 53; Loome v. Wheelwright, 3 Sandf. Ch. 135, 157; Champney v. Coope, 34 Barb. 539; Aiken v. Milwaukee etc. R. R., 37 Wisc. 469.

[1] Bailey v. Richardson, 9 Hare, 734; Tyrwhitt v. Tyrwhitt, 32 Beav. 244; Spencer v. Ayrault, 10 N. Y. 202. And see as to the effect of such recitals, Bean v. Boothby, 57 Me. 295; Campbell v. Knights, 24 Id. 332; Crosby v. Chase, 17 Id. 369; Crosby v. Taylor, 15 Gray, 64.

[2] Swinfen v. Swinfen, 29 Beav. 199; Davis v. Barrett, 14 Id. 542; Hatch v. Skelton, 20 Id. 453; Earl of Clarendon v. Barham, 1 Y. & C. Ch. 688; and cases *ante*, under § 791. If after the ownership and the charge have become united the party does any act which clearly shows that he regards the incumbrance as still subsisting, this is strong even if not conclusive evidence of an intent that there should be no merger; as, for example, he transfers the mortgage, Powell v. Smith, 30 Mich. 451; he bequeaths the incumbrance in specific terms, Blundell v. Stanley, 3 De G. & Sm. 433; and see Wilkes v. Collin, L. R., 8 Eq. 338; or devises the land subject to the charge, Hatch v. Skelton, 20 Beav. 453; but see for a limitation, Johnson v. Webster, 4 De G. M. & G. 474; Astley v. Milles, 1 Sim. 298. A devise of the land without mentioning the incumbrance, is some evidence of an intention that it should merge. Swinfen v. Swinfen, 29 Beav. 199, 204.

[3] Fiske v. McGregory, 34 N. H. 414; Miller v. Fichthorn, 31 Pa. St. 252, 259; Frey v. Vanderhoof, 15 Wisc. 397.

[4] Astley v. Milles, 1 Sim. 298, 345; Wade v. Howard; 11 Pick. 289; 6 Id. 492; Howard v. Howard, 3 Met. 548.

[5] McCabe v. Swape, 14 Allen, 188.

mortgage or the other incumbrances on the land, there is nothing to prevent equity from carrying out his presumed intent, by decreeing against a merger.[1] On the other hand, an assignment of the mortgage to the mortgagor himself raises a contrary presumption. At least, the presumption of a merger is much stronger in this case; it is generally the intention, and is often the duty, of the mortgagor to pay off and discharge the incumbrance by thus becoming the holder of it, and there is a clear distinction between the two cases.[2] An assignment of a mortgage to a grantee of the mortgagor, unless he has expressly assumed to pay it and thus made himself the principal debtor, does not generally create a merger. It generally being for the interest of such grantee to keep the mortgage alive, and to maintain by its means a priority over any subsequent incumbrance or title, such an intention will be presumed and carried into effect by a court of equity.[3] When a mortgage upon the whole land is assigned to one of two or more tenants in common, it is not merged, but may be retained and enforced by him against his co-tenants.[4]

§ 794. **Merger never Prevented when Fraud or Wrong would Result.**—Whatever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented and a mortgage or other security to be kept alive, when this result would aid in carrying a fraud or other unconscientious wrong into effect, under the color of legal forms. Equity only interposes to prevent a merger, in order thereby to work substantial justice.[5]

§ 795. **Life Tenant becomes Entitled to the Charge.**—When a life tenant becomes entitled to a mortgage or other charge upon the entire inheritance, no presumption of a merger arises. The transaction is presumed to be for his own benefit.

[1] Stantons v. Thompson, 49 N. H. 272; Edgerton v. Young, 43 Ill. 464; Freeman v. Paul, 3 Me. 260; Walker v. Barker, 26 Vt. 710; Slocum v. Catlin, 22 Id. 137; Mallory v. Hitchcock, 29 Conn. 127; Mulford v. Peterson, 35 N. J. Law, 127; Thompson v. Boyd, 1 Zabr. 58; 2 Id. 543; Duncan v. Smith, 2 Vroom, 325; Fithin v. Corwin, 17 Ohio St. 118; Knowles v. Lawton, 18 Ga. 476; Dunphy v. Riddle, 86 Ill. 22; Worcester B'k v. Cheeney, 87 Ill. 602; Scott v. Webster, 44 Wisc. 185; Ætna L. Ins. Co. v. Corn, 89 Ill. 170; Meacham v. Steele, 93 Ill. 135.

[2] Idem.

[3] Adams v. Angell, L. R., 5 Ch. D. 634, disapproving of some early decisions; Watts v. Symes, 1 De G. M. & G. 240; Mobile Branch B'k v. Hunt, 8 Ala. 876; Loud v. Lane, 8 Met. 517; Pitts v. Aldrich, 11 Allen, 39; Savage v. Hall, 12 Gray, 363.

[4] Titsworth v. Stout, 49 Ill. 78; Barker v. Flood, 103 Mass. 474; and conversely when the owner of the land becomes devisee of an undivided interest in the mortgage, Clark v. Clark, 56 N. H. 105.

[5] Worthington v. Morgan, 16 Sim. 547; Hutchins v. Carleton, 19 N. H. 487; McGiven v. Wheelock, 7 Barb. 22; Hinchman v. Emans, Saxt. Ch. 100.

The security does not merge, but remains in his hands a valid incumbrance which he may enforce against the inheritance.[1] The same rule applies to every one who has only a partial interest in the land subject to a charge, such as a tenant in common, or a lessee.[2]

§ 796. **II. The Owner of the Land Pays off a Charge upon it.**—The questions now to be considered are quite different from those already discussed. In the preceding subdivision (I.) the ownership of the land and of the charge have become united in any manner in the same person, either by the owner of the land acquiring the charge, or by the holder of the charge acquiring title to the land. Assuming it possible that the two interests *may* be kept distinct, the questions discussed are, whether the charge merges or does not merge; when it is kept alive and when it disappears. In the present division we have the single condition of fact, that the owner of the land which is subject to a charge, mortgage, or other incumbrance, pays it off; whether upon so doing he takes a formal assignment or not is often immaterial. Under these circumstances the distinctive question to be now examined is, whether it is possible for the party thus paying off a charge, to keep it alive as a subsisting incumbrance in any manner, by any form of proceeding? Or whether the charge must necessarily merge in the ownership and cease to exist? If it can not possibly be kept alive, then all further questions of the party's intention, expressed or presumed, are meaningless. If a merger is not necessary, and the charge *can* be kept alive, then the questions concerning the party's intention expressed or presumed, and of the benefit to himself, will of course arise, and will be governed by the rules formulated in the preceding subdivision. If a merger *can* be prevented when the owner of the land pays off a charge, the question whether there is a merger or not, depends upon his intention in the manner already explained. There are two cases to be considered: (1) When the owner in fee pays off a charge. (2) When a life tenant or other owner of a partial interest pays off a charge.

§ 797. **1. Owner in Fee Pays off a Charge.**—An owner of the fee subject to a charge, who is himself the principal and

[1] Countess of Shrewsbury v. Earl of Shrewsbury, 1 Ves. 227, 233; Drinkwater v. Combe, 2 S. & S. 340, 345; Pitt v. Pitt, 22 Beav. 294; Burrell v. Earl of Egremont, 7 Id. 205; Morley v. Morley, 5 De G. M. & G. 610; Adams v. Angell, L. R., 5 Ch. D. 634, 645; and see *post*, cases on mortgages paid off by a doweress or other life tenant, § 799.

[2] Idem; Titsworth v. Stout, 49 Ill. 78; Barker v. Ford, 103 Mass. 474; Clark v. Clark, 56 N. H. 105.

primary debtor, and is liable personally and primarily for the debt secured, can not pay off the charge, and in any manner or by any form of transfer keep it alive. Payment by such a person and under such circumstances necessarily amounts to a discharge. The incumbrance can not be prevented from merging by an assignment taken directly to the owner himself, or to a third person as trustee. This rule applies especially to a mortgagor who continues to be the primary and principal debtor.[1] The rule also applies to a grantee of the mortgagor who takes a conveyance of the land subject to the mortgage, and expressly assumes and promises to pay it as a part of the consideration. He is thereby made the principal debtor, and the land is the primary fund for payment. If he pays off the mortgage it is extinguished.[2]

§ 798. **Owner Who is not Liable for the Debt Pays off the Mortgage.**—On the other hand, when an owner of the premises who is not personally and primarily liable to pay the debt secured, pays off a mortgage or other charge upon it, he *may* keep the lien alive as a security for himself against other incumbrances or titles, and thus prevent a merger. Whether

[1] Johnson v. Webster, 4 De G. M. & G. 474; Otter v. Lord Vaux, 6 Id. 638; Brown v. Lapham, 3 Cush. 551, 554; Wedge v. Moore, 6 Id. 8; Kilborn v. Robbins, 8 Allen, 466, 471; Strong v. Converse, 8 Id. 557; Butler v. Seward, 10 Id. 466; Bemis v. Call, 10 Id. 512; Eaton v. Simonds, 14 Pick. 98; Crafts v. Crafts, 13 Gray, 360; Wadsworth v. Williams, 100 Mass. 126; Cherry v. Monro, 2 Barb. Ch. 618; Robinson v. Urquhart, 1 Beasl. 515; Comm. v. Chesapeake etc. Co., 32 Md. 501; Swift v. Kraemer, 13 Cal. 526. The rule does not necessarily apply to every mortgagor. If a mortgagor has conveyed the land to a grantee who has expressly assumed and promised to pay the mortgage as a part of the consideration, such grantee becomes the principal debtor, primarily liable, and the mortgagor assumes the position of a surety. If the mortgagor then pays off the mortgage, he may preserve its lien alive as a security against the land for his own reimbursement. Stillman v. Stillman, 21 N. J. Eq. 126; Jumel v. Jumel, 7 Paige, 591; Cox v. Wheeler, 7 Id. 248, 257; Halsey v. Reed, 9 Id. 446; Kinnear v. Lowell, 34 Me. 299; Fletcher v. Chase, 16 N. H. 38, 42; Robinson v. Leavitt, 7 Id. 73, 100; Funk v. McReynold, 33 Ill. 481, 495; Baker v. Terrill, 8 Minn. 195, 199.

[2] Mickles v. Townsend, 18 N. Y. 575; Russell v. Pistor, 7 Id. 171; Fitch v. Cotheal, 2 Sandf. Ch. 29; Lilly v. Palmer, 51 Ill. 331; Frey v. Vanderhoof, 15 Wisc. 397; and cases cited at end of the last preceding note. See, however, Kellogg v. Ames, 41 N. Y. 259. Taking a conveyance subject to the mortgage, or with words simply to that effect, does not render the grantee the principal debtor, so as to bring him within the operation of this rule. Pike v. Goodnow, 12 Allen, 472; Strong v. Converse, 8 Id. 557; Campbell v. Knights, 24 Me. 332; Weed etc. Co. v. Emerson, 115 Mass. 554; Belmont v. Coman, 22 N. Y. 438; Trotter v. Hughes, 12 Id. 74; Fowler v. Fay, 62 Ill. 375; Hull v. Alexander, 26 Iowa, 569. If a person who has conveyed land with a covenant warranting against incumbrances, afterwards pays off or takes an assignment of a mortgage upon the premises, the same becomes extinguished; he can not keep it alive as a subsisting lien, for to do so would be a direct violation of his own covenant. Mickles v. Townsend, 18 N. Y. 575; Stoddard v. Rotton, 5 Bosw. 378; Butler v. Seward, 10 Allen, 466; Mickles v. Dillaye, 15 Hun, 296.

he does so, is a question of intention governed by the rules laid down in the previous paragraphs. When it is evidently for his benefit, the intention will be presumed. He may thus be entitled to preserve the lien, even without a formal assignment of the security to himself. Among those who are thus regarded as equitable assignees, are grantees of the mortgagor not having assumed payment of the mortgage, heirs, devisees, and in fact all parties entitled to redeem, and not personally liable as principal debtors.[1]

§ 799. **2. Life Tenant Pays off a Charge.**—The rule is well settled that when a life tenant, or any other person having a partial interest only in the inheritance or in the land, pays off a charge, mortgage, or incumbrance on the entire premises, he is presumed to do so for his own benefit. The lien is not discharged unless he intentionally release it. He can always keep the incumbrance alive for his own protection and reimbursement. His intention to do so will be presumed even though he has taken no assignment. In fact his payment constitutes him an equitable assignee.[2] The rule is most frequently applied in this country to widows entitled to dower in premises subject to a mortgage. If they pay off the mortgage, in order to protect their dower, they become equitable assignees, and may preserve and enforce the lien against the inheritance for reimbursement over and above the proportion of the debt which they are bound to contribute.[3] The rule extends in like manner to tenants for years,[4] and to tenants in common.[5]

§ 800. **Priorities Affected by Merger.**—It is plain from

[1] Parry v. Wright, 1 S. & S. 369; 5 Russ. 142; Watts v. Symes, 1 De G. M. & G. 240, 244; 16 Sim. 640; Squire v. Ford, 9 Hare, 47, 60; Anderson v. Pignet, L. R., 8 Ch. 180, 187; Gunter v. Gunter, 23 Beav. 571; Rawiszer v. Hamilton, 51 How. Pr. 297; Binsse v. Paige, 1 Abb. App. Dec. 138; Powell v. Smith, 30 Mich. 451; Brown v. Lapham, 3 Cush. 551, 554; Pool v. Hathaway, 22 Me. 85; Hatch v. Kimball, 16 Id. 146; Aiken v. Gale, 37 N. H. 501, 505; Drew v. Rust, 36 Id. 335; Spaulding v. Crane, 46 Vt. 292; Walker v. King, 45 Id. 525; 44 Id. 601; Wheeler v. Willard, Id. 640; Warren v. Warren, 30 Id. 530; Cheeseborough v. Millard, 1 Johns. Ch. 409; Bell v. Mayor, 10 Paige, 49; Skeel v. Spraker, 8 Id. 182; Millspaugh v. McBride, 7 Id. 509; Abbott v. Kasson, 72 Pa. St. (22 P. F. Sm.) 183.

[2] Shrewsbury v. Shrewsbury, 1 Ves. 233; Drinkwater v. Combe, 2 S. & S. 340, 345; Burrell v. Earl of Egremont, 7 Beav. 205; Pitt v. Pitt, 22 Id. 294; Morley v. Morley, 5 De G. M. & G. 610.

[3] Foster v. Hilliard, 1 Story, 77; Swaine v. Perine, 5 Johns. Ch. 490; Bell v. Mayor etc., 10 Paige, 49; Lamson v. Drake, 105 Mass. 567; Newhall v. Savings B'k, 101 Id. 431; McCabe v. Swap, 14 Allen, 191; Davis v. Wetherell, 13 Id. 63; McCabe v. Bellows, 7 Gray, 148; Gibson v. Crehore, 3 Pick. 475; Houghton v. Hapgood, 13 Id. 158; Carll v. Butman, 7 Me. 102, 105; Spencer v. Waterman, 36 Conn. 342.

[4] Averill v. Taylor, 8 N. Y. 44; Loud v. Lane, 8 Met. 517; Bacon v. Bowdoin, 22 Pick. 401.

[5] See *ante*, § 795, and cases cited in note.

the foregoing discussion, that the doctrine of merger, in its application to incumbrances, has an intimate connection with the general subject of priorities. Whether a certain mortgage or other charge is still subsisting, and retains its priority, or whether it is in reality, though not perhaps in form, extinguished, so as to let in subsequent liens, must often be determined by the rules concerning merger. The doctrine has therefore a twofold application—between the immediate parties, the owner of the land or the debtor on one side and the holder of the lien on the other, and between the holders of successive incumbrances and partial interests.

SECTION IX.

CONCERNING EQUITABLE ESTOPPEL.

ANALYSIS.

§ 801. Nature of the rights created by estoppel.
§ 802. Origin of equitable estoppel.
§ 803. How far fraud is essential in equitable estoppels.
§ 804. Definition.
§ 805. Essential elements constituting the estoppel.
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§§ 808–812. Requisites further illustrated.
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§ 816. Acquiescence.
§ 817. Same: as preventing remedies.
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§ 819. As applied to corporations and stockholders.
§ 820. Other instances of acquiescence.
§ 821. Owner estopped from asserting his legal title to land.

§ 801. **Nature of the Rights Created by Estoppel.**—It has been said by some writers and judges, that the doctrine of equitable estoppel is a branch merely of the law of evidence.

This is, however, an entirely mistaken and by no means harmless view. Nothing can tend to produce more confusion of mind in the correct understanding of legal rules, and in their proper application to the affairs of life, than the exhibition of them under wrong divisions of the law, and the consequent representation of them as connected with relations which do not exist. It is undoubtedly true that authors of works on evidence intended for professional use, do often treat of matters which form no legitimate part of that subject. This may be convenient, but it is not an accurate and scientific method, and should never be pursued when the purpose is to define and describe the nature of legal doctrines and of the rights and duties which flow therefrom. Rules which determine and regulate primary rights of property and of contract constitute a part of the substantive law, and do not belong to the law of evidence, which is simply a branch of the law concerning procedure.[1] The rights and corresponding duties created by estoppels are primary—rights of property or of contract. This is certainly true of common law estoppels, and it is no less true of equitable estoppels; the effect of the latter is substantially the same as that of the former, the difference being in the facts from which the estoppel arises, and not in the consequences produced by it. An estoppel determines the right, which a person may enforce by action, or rely on in defense, and not the mere mode and means by which those rights may be proved.[2]

[1] This truth is clearly and most conclusively shown by Sir James Fitzjames Stephen, in the introduction to his admirable work entitled a "Digest of the Law of Evidence" (pp. xiii, xiv).

[2] One or two illustrations will clearly show the correctness of this statement. A tenant is estopped from denying his landlord's title—this is certainly a right of property, enabling the landlord to recover rent, or perhaps the land itself, *although he has in fact no title and no other right of property than that created by the estoppel.* An acceptor is estopped from denying the genuineness of the prior signatures on the bill. This is a right of contract, whereby the holder may be enabled to recover the amount of the bill from the acceptor, and it may possibly be the only ground upon which a recovery can be rested. One other illustration of an estoppel regarded as more distinctively equitable, and having more the *appearance* of being only a rule of evidence: A. is owner of land. He stands by, and knowingly permits B. to expend money and make improvements on the land under the innocent but mistaken assumption of a right to do so, and interposes no objection, asserts no claim of title. A. is then estopped from setting up his title as against B.'s right to the improvements. This is clearly a right of property in B. In strictness A. has the whole title, and B. has no right of property by the ordinary rules of law applicable in the absence of the estoppel. The estoppel *creates* a right in B., which is as much a right of property as though it had resulted from a conveyance, or from a statutory adverse possession; it is his only right of property; it may not be absolute, but is no less a right of property. One mode of acquiring title is by the common law estoppel resulting from a covenant of warranty. It is a pure fiction to say that the covenantee does not acquire a title by the estoppel.

In fact the principle which underlies the doctrine of the implied authority of an agent in most of its applications, and which prevents the principal from denying the authority which, by his conduct, he has held the agent out to the world as possessing, is identically the same principle which constitutes the essence of all equitable estoppels; and if the rules concerning these estoppels are merely a part of the law of evidence, we should, for the same reason and to the same extent, regard the rules concerning the nature and effects of implied agency as also belonging to evidence. Many similar illustrations might be selected from various departments of the law. Equitable estoppel is, therefore, a particular doctrine, based upon justice and conscience, which is the origin, wherever it may be invoked, of primary rights of property or of contract.

§ 802. **Origin of Equitable Estoppel.**—Estoppel was recognized by the common law at a very early day. The original legal rules concerning it were arbitrary and sometimes unjust, and are still, to a certain extent, technical and strict. Lord Coke gave a very harsh definition of estoppel as it existed in his time. "An estoppel is where a man is concluded by his own act or acceptance to say the truth." He added: "Touching estoppels, which are a curious and excellent sort of learning, it is to be observed that there are three kinds of estoppels, viz., by matter of record, by matter in writing, and by matter *in pais*." His discussion shows clearly that "by matter in writing" he meant only a deed—a writing under seal. The instances which he gave of estoppels *in pais* were: "By matter *in pais*, as by livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate." These instances of legal estoppels *in pais* are not included within the "equitable estoppels" which form the subject-matter of the present section. Although the facts from which equitable estoppels arise are all matters *in pais* as distinguished from records and deeds, yet the whole doctrine is an expansion of and addition to the original legal estoppels *in pais*, and embraces rules unknown to the law when Lord Coke wrote. Equitable estoppel, in the modern sense, arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law unless prevented by

the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel.[1] The doctrine of equitable estoppel is pre-eminently the creature of equity. It has, however, been incorporated into the law, and is constantly employed by courts of law at the present day in the decision of legal controversies. Preserving its original character, and de-

[1] Horn v. Cole, 51 N. H. 287, 289. The opinion of Perley, C. J., in this case, is such an admirable and accurate representation of the true reasons and grounds of the doctrine, pointing out so clearly the distinctions between estoppel from conduct as a creature of equity, and estoppel *in pais* at law, establishing so firmly on the solid foundation of justice and good conscience the equitable conception, and sustaining so completely the various positions of the text, both as to the nature of estoppel as a rule of property, contract, or remedy, rather than a mere rule of evidence, and as to the essential requisites—that I can not refrain from quoting it at some length. Mr. Ch. Just. Perley says: "The ground on which a party is precluded from proving that his representations on which another has acted were false, is, that to permit it would be contrary to equity and good conscience. * * * It thus appears that what has been called an equitable estoppel, and sometimes with less propriety an estoppel *in pais*, is properly and peculiarly a doctrine of equity, originally introduced to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights—though now with us, like so many other doctrines of equity, habitually administered at law. * * * It would have a tendency to mislead us in the present inquiry, as there is reason to suspect that it has sometimes misled others, if we should confound this doctrine of equity with the *legal estoppel by matter in pais*. The equitable estoppel and legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it, are not only different, but directly opposite. The legal estoppel shuts out the truth, and *also the equity and justice* of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy a record is held to import incontrovertible verity; and for the same reason a party is not permitted to contradict his solemn admissions by deed. And the same is equally true of legal estoppel by matter *in pais*. * * * Legal estoppels exclude evidence of the truth, and the equity of the particular case, to support a strict rule of law on grounds of public policy. Equitable estoppels are admitted on the exactly opposite ground of promoting equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppels depend, are usually proved by oral evidence; and the evidence should doubtless be carefully scrutinized, and be full and satisfactory, before it should be admitted to estop the party from showing the truth, *especially in cases affecting the title to land*. But where the facts are clearly proved, the maxim that estoppels are odious—which was used in reference to legal estoppels, because they shut out the truth and justice of the case—ought not to be applied to these equitable estoppels, as it has sometimes been, inadvertently as I think, from a supposed analogy with the legal estoppel by matter *in pais*, to which they have, in this respect, no resemblance whatever. * * * In this equitable estoppel the party is forbidden to set up his legal title, because he has so conducted himself that to do it would be contrary to equity and good conscience. As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety, and, unless courts of law are willing to abdicate the duty of administering the equitable doctrine effectually in the suppression of fraud and dishonesty, the application of it can not be confined within the

pending upon equitable principles, it is administered impl the same manner, and in conformity with the same rules, b wly the courts both of law and of equity, so that the decisions of by either class of tribunals may be quoted as authorities in the ess ubsequent discussion. The particular applications of the do ssc doctrine are so various and so numerous, that no attempt will be es made to discuss them with any fullness. I shall confine myself ld simply to an explanation of the general principles which dete s mine

limit of any narrow technical definition, such as will relieve courts from looking, as in other cases depending on fraud and dishonesty, to the circumstances of each individual case. Certain general rules will doubtless apply, as in other cases where relief is sought on such grounds. But I find myself unable to agree with the authorities where the old maxim that legal estoppels are odious, has been applied to this equitable estoppel, and where attempts have been made to lay down strict definitions such as would *defeat the remedy in a large proportion of the cases that fall within the principle* on which the doctrine is founded. The doctrine having been borrowed from equity, courts of law that have adopted it should obviously look to the practice in equity for their guide in their application of it; and in equity the doctrine has been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition. For instance, *the doctrine has not in equity been limited to cases where there was an actual intention to deceive.* The cases are numerous where the party, who was estopped by his declarations or his conduct to set up his legal title, was ignorant of it at the time, and of course could have had no actual intention to deceive by concealing his title. Yet if the circumstances were such that *he ought to have informed himself*, it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations. *Nor is it necessary in equity that the intention should be to deceive any particular individual or individuals.* If the representations are such, and made in such circumstances, that all persons interested in the subject-matter have the right to rely on them as true, their truth can not be denied by the party that has made them against any one who has trusted to them and acted on them." [After citing and commenting on numerous decisions, the chief justice concludes, p. 300.] "Though I do not find that the precise point taken here for the plaintiff has been directly decided in any of our cases, yet the general current of our decisions on the subject tends to a liberal application of the doctrine for the suppression of fraud and dishonesty, and the promotion of justice and fair dealing. No disposition has been shown in the courts of this state to treat this equitable estoppel as odious, and embarrass its application by attempts to confine it within the limits of a narrow technical definition. We are content to follow where the spirit and general tone of these decisions lead. And they lead plainly to the conclusion, that, where a man makes a statement disclaiming his title to property, in a manner and under circumstances such as he must understand those who heard the statement would believe it to be true, and, if they had an interest in the subject, would act on it as true, and one, using his means of knowledge with due diligence, acts on the statement as true, the party who makes the statement can not show that his representation was false to the injury of the party who believed it to be true and acted on it as such; that he will be liable for the natural consequences of his representation, and can not be heard to say that the party actually injured was not the one he meant to deceive, or, that his fraud did not take effect in the manner he intended." These views will, in my opinion, reconcile much apparent conflict of judicial decision; they certainly furnish the basis of principle upon which the administration of the doctrine by courts of equity must be rested. See, also, Stevens v. Dennett, 51 N. H. 324, 333, *per* Foster, J. (*post*, in note under § 805.)

the nature, essential elements, operation, and effect of the equitable estoppel, and to a brief statement of a few important applications which frequently come before courts of equity. For more exhaustive discussion the reader is referred to treatises on the law of estoppel.

§ 803. **How far Fraud is Essential in Equitable Estoppels.**—There is a theory which makes the essence of equitable estoppel to consist of fraud. In accordance with this view, the language used by some courts in defining and describing the general doctrine, has been so sweeping and positive, that taken literally it does not admit the possibility of such an estoppel unless the party has been guilty of actual intentional fraud in law; and thus the whole doctrine is represented as virtually a mere instance of legal fraud. This theory is not sustained by principle, and it can not be made universal. There are well-settled cases of equitable estoppel, familiar to courts of equity, which do not rest upon fraud, and instances are admitted even by the courts which maintain this theory, which can not be said to involve any element of fraud unless by a complete perversion and misuse of language. It is, undoubtedly, in accordance with the methods long pursued by courts of equity, to apply the term fraudulent to the party estopped, in the following manner. It is in strict agreement with equitable notions to say of such party, that his repudiation of his own prior conduct which had amounted to an estoppel, and his assertion of claims notwithstanding his former acts or words, would be *fraudulent*, would be a *fraud* upon the rights of the person benefited by the estoppel. It is accurate, therefore, to describe equitable estoppel in general terms, as such conduct by a party that it would be fraudulent, or a fraud upon the rights of another, for him afterwards to repudiate, and to set up claims inconsistent with it. This use of the term has long been familiar to courts of equity, which have always treated the word "fraud" in a very elastic manner. The meaning here given to fraud or fraudulent is virtually synonymous with "unconscientious" or "inequitable." In exactly the same manner, and with exactly the same signification given to the word, the doctrine of specific enforcement of verbal contracts for the sale of land when part performed by the plaintiff, has been explained by saying that it would be fraudulent for the defendant to contest his liability by setting up the statute of frauds after he had permitted the plaintiff, without objection, to go on and part perform the verbal agreement. In this explanation courts of equity do not

mean that the defendant's conduct in denying the validity of the agreement is *actual* fraud—a willful deception, but simply that it is unconscientious; much less do they assert that there was actual fraud—willful deception—in the act of entering into the verbal contract. In exactly the same manner, it is in strict accordance with equitable conceptions and equitable terminology, to describe as fraud or fraudulent, the act of repudiating conduct which had constituted an estoppel, and of asserting claims inconsistent therewith; it is entirely another thing to say that the conduct itself—the acts, words, or silence of the party—constituting the estoppel, is an actual fraud, done with the actual intention of deceiving. I would venture the suggestion that the theory which regards fraud as the essence of equitable estoppel, originated in courts possessing only a partial and limited jurisdiction. Such courts, administering nearly the whole jurisprudence by means of legal actions, and being able to admit equitable notions only so far as they could be harmonized with legal dogmas and legal procedure, would naturally formulate the doctrine of equitable estoppel in such a manner that it should become a rule of law not inconsistent with the legal system as a whole. This could only be done by giving prominence to the element of fraud, and by making it in fact essential. By this method equitable estoppel was made to be a branch or application of the legal rules concerning fraud. The theory having been thus formulated by tribunals of great ability and high authority, was perhaps adopted by other courts without a careful examination of its occasion and origin. When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general principle: When one of two innocent persons, that is, persons each guiltless of an intentional, moral wrong, must suffer a loss, it must be borne by that one of them who by his conduct —acts or omissions—has rendered the injury possible. This is confessedly the foundation of the rules concerning the implied authority of agents, which are declared by judges of the highest ability to be applications of the doctrine of equitable estoppel.[1] This most righteous principle is sufficient, and alone sufficient to explain all instances of such estoppel, and although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element, if the word is used in its true legal meaning.

[1] See North River B'k v. Aymar, 3 Hill, 262; Farmers & M's' B'k v. Butchers & D's' B'k, 16 N. Y. 125; Griswold v. Haven, 25 Id. 595; Exchange B'k v. Monteath, 26 Id. 505.

§ 804. **Definition.**—From the foregoing general description it will appear, I think, that the following definition is accurate, and covers all phases and applications of the doctrine. Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.[1]

§ 805. **Essential Elements Constituting the Estoppel.**—In conformity with the principle already stated which lies at the basis of the doctrine, and upon the authority of decisions

[1] This definition, it will be observed, differs somewhat in form from that often given by text-writers. It is based upon an abandonment of the fiction that estoppel is a mere rule of evidence not affecting the real rights of parties, and it incorporates the truth that the party estopped loses, and the party having the benefit of the estoppel obtains, a right, which may be of property, of contract, or sometimes simply of remedy. In his Digest of the Law of Evidence (p. 124), Sir James Fitzjames Stephen thus formulates the doctrine: "When one person by anything which he does or says, or abstains from doing or saying, intentionally causes or permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.

"When any person, under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business, neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act."

The first clause states the rule in its ordinary applications, and the author cites as examples: Pickard v. Sears, 6 A. & E. 469, 474; Freeman v. Cooke, 2 Exch. 654, 661; Howard v. Hudson, 2 E. & B. 1; Knights v. Wiffen, L. R., 5 Q. B. 660. The second clause states the rule in its application to the case of a negligent act causing fraud. As examples, he cites Young v. Grote, 4 Bing. 253, where A. signed blank checks and gave them to his wife to fill up as she wanted money. She filled up a check for £50 2s. so carelessly that room was left for the insertion of figures before the "50" and of words before the "fifty." She gave the check to A.'s clerk to get it cashed. He inserted a 3 before the 50, and "three hundred and" before the "fifty," and A.'s banker in good faith paid the check so altered to the clerk: *Held*, that A. was estopped as against the banker to claim that the check was not valid: Swan v. North Br. etc. Co., 2 H. & C. 175, 181, *per* Blackburn, J. A man carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief. The author also cites on the doctrine generally, B'k of Ireland v. Evans's Charities, 5 H. L. Cas. 389; Swan v. British Austr. Co., 7 C. B. N. S. 400, 448; 7 H. & N. 603; 2 H. & C. 175; Halifax Guardians v. Wh[illegible] wright, L. R., 10 Exch. 183; Ca[illegible] London & N. W. R'y, L. R., 1 [illegible] 307, 316, 317.

which have recognized and adopted that principle, the following are the essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications. One caution, however, is necessary, and very important. It would be unsafe and misleading to rely on these general requisites as applicable to every case, without examining the instances in which they have been modified or limited. (1) There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least, the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him.* (4) The conduct must be done with the intention, or at least with the *expectation,* that it will be acted upon by the other party; or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species, in which it is simply *impossible* to ascribe any *intention* or even *expectation* to the party estopped, that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. (5) The conduct must be relied upon by the other party, and thus relying he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego, or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.[1] It will be seen that *fraud* is not given

[1] I shall cite only a few of the leading and ablest decisions which illustrate the text, and especially those which do not admit fraud as a necessary element of the conduct by which a party is estopped. Pickard v. Sears, 6 A. & E. 469, 474, is the leading case. The facts substantially were, A., the owner of chattels in B.'s possession, which were taken in execution by C., abstained from claiming them for several months, and conversed with C.'s attorney about them without mentioning his own claim, and thus impressed C. with the belief that the goods belonged to B. C. sold them, and this was held sufficient to sustain a finding that A. was estopped. In giving the opinion of the court Lord Denman thus stated the rule: "The rule of the law is clear that where one by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things as existing at the same time." The word "willfully" in this statement might imply that fraud was a necessary ingredient in the conduct which creates an estoppel. The word was, however, explained in subsequent decisions, and this interpretation completely abandoned. In Freeman v. Cooke, 2 Exch. 654, Parke, B., said: "The rule laid down in Pickard v.

as an essential requisite in the foregoing statement. It is not absolutely necessary that the conduct mentioned in the first subdivision, should be done with a fraudulent purpose or intent, or with an actual and fraudulent intention of deceiving the other party; nor is this meaning implied by any of the language which I have used. The adoption of such an element as

Sears, was to be considered as established; but that by the term 'willfully' in that rule, must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, *whatever a man's real meaning may be*, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect; as, for instance, a retiring partner omitting to inform his customers of the firm, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being authorized." In the still later case of Cornish v. Abington, 4 H. & N. 549, Pollock, C. B., said that the term "willfully" as used in Pickard v. Sears, meant simply "voluntarily," and that this was its established signification. He added the following statement of the general rule: "If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he can not afterwards say that he is not bound, if another, so understanding it, has acted upon it. *If any person by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, can not afterwards gainsay the reasonable inference to be drawn from the words or conduct.*" This mode of stating the general rule is absolutely necessary to explain numerous well-settled and even familiar applications of the estoppel, where it is not only impossible to impute to the party estopped any actual intention that his conduct should be acted upon by the other party, but even where the conduct was done without any knowledge or expectation that it ever would be so acted upon by the person who does afterwards act upon it and thus obtains the benefit of the estoppel. In the quite recent case *In re* Bahia etc. Ry., L. R., 3 Q. B. 584, the necessity of fraud as an essential ingredient of the conduct was again denied, the court holding that if a representation is made with the intention that it shall be acted upon by another, and he does so act upon it, there is an estoppel. Finally, in the rule as carefully formulated by Mr. Stephen upon the basis of the latest English decisions, as quoted in the previous note, the element of fraud is clearly omitted. In fact, the second paragraph of his rule includes cases, covered by the foregoing language of Ch. Baron Pollock, where there is even no intention on the part of the one estopped that his conduct should be acted upon.

American cases of the highest authority are no less explicit. In Continental B'k v. B'k of the Comm'th, 50 N. Y. 575, 581, 582, Folger, J., said: "Is the plaintiff estopped from maintaining that the certificate was a forgery, and the admission of its teller an innocent mistake? There is no disagreement as to the general definition of an estoppel *in pais*. It is agreed that there must have been some act or declaration of the plaintiff or of its agent to the defendant's assignor, which so affected the conduct of the latter to their injury, as that it would be unjust now to permit the plaintiff to set up the truth of the case to the contrary of its mistaken act or declaration. But the plaintiff insists that there are certain limitations to be put upon this generality. The plaintiff claims that it is necessary that its act or declaration must have been made with the intent to mislead." [The judge examines the English cases

always essential, would at once strike out some of the most familiar and best established instances of equitable estoppel. Undoubtedly a fraudulent design to mislead is often present as an ingredient of the conduct working an estoppel; but this only renders the result more clearly just, and if I may use the expression, more conclusive. There is, however, a class of cases,

above quoted.] "We hold that there need not be, upon the part of the person making a declaration or doing an act, an intention to mislead the one who is induced to rely upon it. There are cases in which parties have been estopped, when their acts or declarations have been done or made in ignorance of their own rights, not knowing that the law of the land gave them such rights. Here certainly there could be no purpose to mislead others, for there was not the knowledge to inform the purpose, and both parties were equally and innocently misled. Indeed, it would limit the rule much within the reason of it, if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held that when it is a breach of good faith to allow the truth to be known, there an admission will estop. (Gaylord v. Van Loan, 15 Wend. 308.) There are decisions where the rule has been stated as the plaintiff claims it. We have looked at those cited. It was not necessary to the conclusion of the court in them, that such a restriction should be put upon the rule." The court further *held*, that it is not necessary that a party should act *affirmatively* upon a declaration, in order to claim an estoppel. It is sufficient if he had the means in his possession of protecting his rights or of restoring himself to his original position, and in reliance upon the declaration, and in consequence of it, he refrains from using those means, and is thereby injured; his claim to the estoppel is good. In Blair v. Wait, 69 N. Y. 113, 116, the court said: "It is not necessary to an equitable estoppel that the party should design to mislead. It is enough that the act was calculated to mislead and actually did mislead the defendants, while acting in good faith and with reasonable care and diligence, and that thereby they might be placed in a position which would compel them to pay a demand which they had every reason to expect was canceled and discharged." To exactly the same effect is Man. & Trad. B'k v. Hazard, 30 N. Y. 226, 230, *per* Johnson, J.; Barnard v. Campbell, 55 N. Y. 456, 462, 463. Where the real owner of chattels is estopped from setting up his own title as against a purchaser from a third person who was in possession and sold them under a claim of ownership. This decision expressly rests the doctrine of equitable estoppel upon the general principle mentioned in a foregoing paragraph (§ 802). Allen, J., said: "The defendants can only resist the claim of the plaintiffs to the merchandise, by establishing an equitable estoppel founded upon the acts of the plaintiffs, and in application of the rule by which, as between two persons equally innocent, a loss resulting from the fraudulent acts of another, shall rest upon him by whose act or omission the fraud has been made possible. * * * * In such a case, for obvious reasons, the law raises an equitable estoppel. It is not every parting with the possession of chattels or the documentary evidence of title, that will enable the possessor to make good a title to one who may purchase from him. The owner must go further and do some act of a nature to mislead third persons as to the true nature of the title. Two things must concur to create an estoppel by which an owner may be deprived of his property by the act of a third person without his assent, under the rule now considered. (1) The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it. (2) The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*." See, also, in support of the text and of the general requisites there stated: Waring v. Somborn, 82 N. Y. 604; Hurd v. Kelly, 78 Id. 588, 597; Malloney v. Horan, 49 Id. 111, 115; Jew-

of which an example is given in the foot-note, where fraudulent conduct *is* essential—cases in which an owner of *land* is precluded from asserting his legal title by reason of intentionally false representations or concealments, by which another has been induced to deal with the land. These cases are at the present day sometimes treated as examples of equitable es-

ett v. Miller, 10 Id. 402, 406; Shapley v. Abbott, 42 Id. 443, 448; St. John v. Roberts, 31 Id. 441; Brown v. Bowen, 30 Id. 519, 541; Lawrence v. Brown, 5 Id. 394, 401; Frost v. Saratoga Mut. Ins. Co., 5 Denio, 154, 158; Welland Canal Co. v. Hathaway, 8 Wend. 480, 483. In this connection, it will be instructive by way of contrast to quote a passage from a very recent decision by the New York court of appeals, involving a particular application of estoppel *in pais* in which a fraudulent intent, or what amounts to such an intent, is an essential element of the conduct which creates the estoppel, in pursuance of an equitable principle long settled by such cases as Evans v. Bicknell, 6 Ves. 174, 182, and Slim v. Croucher, 1 De G. F. & J. 518—a principle which has been erroneously, I think, regarded as the foundation of all equitable estoppel, and therefore to be extended to every instance of it. The case is Trenton Banking Co. v. Sherman, 24 Albany Law J., No. 20, p. 390. The estoppel alleged would affect the title to land. The action was brought to charge certain land of the defendant with the payment of a judgment. Andrews J. said: "As a general rule it would seem to be just that if a person does an act at the suggestion of another, the other shall not be permitted to avoid the act when it turns out to the prejudice of an antecedent right or interest of his own, although the advice on which the other party acted *was given innocently and in ignorance of his claim.* The authorities establish the doctrine that the owner of land may by an act *in pais* preclude himself from asserting his legal title. But it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character, To authorize the finding of an estoppel *in pais* against *the legal owner of lands* there must be shown, we think, either actual fraud, or fault or negligence equivalent to fraud, on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part, as in Storrs v. Barker, 6 Johns. Ch. 166, so as to render it just that, as between him and the party acting upon his suggestion, he should bear the loss. Moreover the party setting up the estoppel must be free from the imputation of *laches* in acting upon the belief of ownership by one who has no right." There is no inconsistence between this view and the decisions before quoted. In the first sentence of the extract Andrews, J., states the rule ordinarily applicable in exact conformity with those authorities; he then passes to the particular case controlled by a special equity. Dezell v. Odell, 3 Hill, 215, is a leading case on the general doctrine. A sheriff levied on goods by execution against A., and delivered them to B., the latter giving a receipt promising to redeliver them to the sheriff by a certain day: *Held*, that B. was estopped from claiming as against the sheriff that the goods belonged to himself and not to A. Bronson, J., dissented not with respect to the law of estoppel, but only as to its application to the facts. His opinion contains an accurate *résumé* of some necessary elements belonging to the estoppel, and I shall quote some portions. He says (p. 221): "When a party either by his declaration or conduct has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person, or to some one claiming under him. Before the party is concluded it must appear, 1. That he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim which he proposes to set up; 2. That the other party has acted upon the admission; and, 3.

toppel. The principle, however, upon which they depend, was well settled by courts of equity long before the doctrine of equitable estoppel in its modern form was first announced, and goes in its remedial operation far beyond that doctrine, as will more fully appear in subsequent paragraphs. I would again remark that although fraud is not an essential element of the original conduct working the estoppel, it may with perfect propriety be said that it would be fraudulent for the party to re-

That he will be injured by allowing the truth of the admission to be disproved." After quoting several cases, he proceeds (p. 224): "The conduct or admission which precludes the party must be plainly inconsistent and irreconcilable with the right which he afterwards sets up. If the act can be referred to an honest and proper motive, the party will not be concluded. Heane v. Rogers, 9 B. & C. 577. So, too, the admission, however unequivocal it may be, will not operate as an estoppel unless the other party has acted upon it; and then it will only be conclusive in favor of the party who has so acted, and persons claiming under him, and not in favor of a stranger. Heane v. Rogers, *supra;* Wallis v. Truesdell, 6 Pick. 455." The decisions of the Pennsylvania courts have generally leaned strongly in favor of the theory that an actual fraud is the very essence of every such estoppel by conduct. In a very late case, however, Bidwell v. Pittsburgh, 85 Pa. St. 412, 417, *per* Mercur, J., it is held: "It may now be declared as a general rule that where an act is done, or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to what otherwise would be mere matter of evidence. It is not necessary that the party against whom an estoppel is alleged should have intended to deceive; it is sufficient if he intended that his conduct should induce another to act upon it, and the other, relying on it, did so act." In Stevens v. Dennett, 51 N. H. 324, 330, Foster, J., after reciting the essential elements according to what he calls "the common definitions," and substantially as given above in the text, adds: "The doctrine seems to be established by authority that the conduct and admissions of a party operate against him in the nature of an estoppel, wherever, in good conscience and honest dealing, he ought not to be permitted to gainsay them. Thus, negligence becomes constructive fraud—although, strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and negligence may be deemed compatible. In such cases, the maxim is justly applied to him, that when one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and loss." In the last sentence the judge has struck the "bed rock" of universal principle, upon which all instances of equitable estoppel must be founded, if they are to stand with any firmness. See, also, Horn v. Cole, 51 N. H. 287, 289, *per* Perley, C. J. (quoted *ante*, note under § 802); Morgan v. Railroad Co., 6 Otto, 716; Holmes v. Crowell, 73 N. C. 613, 627; Anderson v. Armstead, 69 Ill. 452, 454; Voorhees v. Olmstead, 3 Hun, 744; Clark v. Coolidge, 8 Kans. 189, 195; Kuhl v. Mayor etc., 23 N. J. Eq. (8 C. E. Green), 84, 85; Rice v. Bunce, 49 Mo. 231, 234. (In a very instructive opinion, Wagner, J., while using the general expression that fraud is an essential element, explains it by showing that the "fraud" need not be an actual intent to deceive in the representation which creates the estoppel; the "fraud" may and generally does consist in the subsequent attempt to controvert the representation and to get rid of its effects, and thus to injure the one who has relied on it. The same explanation would doubtless apply to, and show the real meaning of, many other decisions which have used the general formula that fraud is essential). McCabe v. Raney, 32 Ind. 309; Simpson v. Pearson, 1 Id. 65; Hartshorn v. Potroff, 89 Ill. 509; Talcott v. Brackett, 5 Ill. App. 60; Michigan etc. Co. v. Parsell, 38 Mich. 475, 480.

pudiate his conduct, and to assert a right or claim in contravention thereof. Using the term in the sense frequently given to it by courts of equity, and as explained in a preceding paragraph, this statement is not only proper, but furnishes an accurate criterion for determining the existence of an equitable estoppel.

§ 806. **Theory that a Fraudulent Intent is Essential.**—There is, as has already been mentioned, a theory approved and adopted by the courts of some states, which makes the very essence of every equitable estoppel or estoppel by conduct to consist of fraud; and affirms that an actual fraudulent intention to deceive or mislead, is a necessary requisite in the conduct of the party—whether acts, words, or silence—in order that it may create an equitable estoppel. I can not better state this theory than in the language of an eminent and able judge, which has frequently been adopted as being an accurate exposition of the general doctrine.[1] In order to estop a party by

[1] Boggs v. Merced Min. Co., 14 Cal. 279, 367, 368, *per* Field, J., adopted in Martin v. Zellerbach, 38 Cal. 300, and cases cited. It should be remarked that in the great case of Boggs v. Merced Min. Co., Mr. Justice Field was not treating of equitable estoppel in general. He was discussing the particular question, when is the owner of land precluded by his conduct from setting up his legal title? In formulating the rules quoted in the text, he did not announce them as governing all cases of equitable estoppel; he expressly confined them to the class of cases under consideration by saying: In order to estop a person by his admissions or declarations from setting up "his title to land." The authorities which he quoted were Adams on Eq., p. 151 (marg. pag.), and Story, § 391. The reference to Adams clearly indicates the doctrine which Judge Field was following. The general subject there treated of by Adams is "the equity of a party who has been misled is superior to his who has willfully misled him." The particular rule referred to is: "If a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and *compelled to make his representation specifically good.*" This rule is illustrated by such cases as Evans v. Bicknell, 6 Ves. 174; Filling v. Armitage, 12 Id. 78, 84; Williams v. Earl of Jersey, 1 Cr. & Ph. 91; Martinez v. Cooper, 2 Russ. 198; Slim v. Croucher, 1 De G. F. & J. 518, 525. This equitable rule has been explained and illustrated in the foregoing sections on priorities, §§ 686, 731, and on *bona fide* purchase, §§ 779-782. In the subsequent case of Martin v. Zellerbach, 38 Cal. 300, the court adopted the exact requisites of Mr. Justice Field, but omitted his restriction of them to cases involving the legal title to land, announced them as governing all instances of equitable estoppel, and applied them to a case involving the ownership of chattels. The following are additional examples of decisions which sustain the same theory. Brant v. Virginia Coal Co., 3 Otto, 326, 335, *per* Field, J.: "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury." [He quotes a passage from Story Eq. Jur. § 391.] "Thus it is said by the supreme court of Pennsylvania, that the primary ground of this doctrine is that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others had acted. The element of fraud is essential *either in the inten-*

his conduct, admissions, or declarations, the following are essential requisites. It must appear: (1) That the party making his admission by his declaration or conduct, was apprised of the true state of his own title; (2) That he made the admission *with the express intention to deceive*, or with such careless or culpable negligence *as to amount to constructive fraud;* (3) That the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge; (4) That he relied directly upon such admission, and will be injured by allowing its truth to be disproved.

§ 807. **Fraudulent Intent Necessary in an Estoppel Affecting the Legal Title to Land.**—The particular case referred to in the foregoing foot-note requires a fuller explanation. It is a purely equitable doctrine settled long before the modern rules of equitable estoppel by conduct. It is confined to estates in land. The general rule is that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to

tion of the party estopped, *or in the effect of the evidence* which he sets up. It would seem that in the enforcement of an estoppel of this character, with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established. There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct in which the presence of fraud actual or constructive is wanting; as where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the profits of a transaction, he is not permitted to deny its validity while retaining its benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced." With great deference to the opinion of so able a judge, I think his error in this passage is evident. It consists in taking a special rule, established from motives of policy for a particular condition of fact, and raising it to the position of a universal rule. Where an estoppel by conduct is alleged to prevent a legal owner of land from asserting his legal title, courts of equity, in order to avoid the literal requirements of the statute of frauds, were driven to the element of fraud in the conduct as essential. (See the text, §§ 805, 807). The passage quoted from Judge Story is dealing with this long-settled rule of equity, and not with the subject of equitable estoppel in general. When this special rule is made universal, its inconsistency with many familiar instances of equitable estoppel becomes apparent, and Judge Field is forced to escape from the antagonism by denying that these instances do in fact belong to the doctrine. If this conclusion be correct, then some of the most important and well-settled species of the estoppel, uniformly regarded as such by text-writers and courts, must be abandoned, and the beneficent doctrine itself must be curtailed in its operation, to one particular class of cases. This result is in direct opposition to the tendency of judicial decision and of the discussions of text-writers. See, also, Dorlarque v. Cress, 71 Ill. 380, 381, 382; McKinzie v. Steele, 18 Ohio St. 38, 41 (a dictum); Eldred v. Hazlett's Adm'r, 33 Pa. St. 307; Rhodes v. Childs 64 Id. (14 P. F. Sm.) 18; White v. Langdon, 30 Vt. 599.

the party misled, and compelled to make his representation specifically good. It applies to one who denies his own title or incumbrance when inquired of by another who is about to purchase the land or to loan money upon its security; to one who knowingly suffers another to deal with the land as though it were his own; to one who knowingly suffers another to expend money in improvements, without giving notice of his own claim, and the like. This equity, being merely an instance of fraud, requires intentional deceit, or at least that gross negligence which is evidence of an intent to deceive. In the language of a most recent decision, to preclude the owner of land from asserting his legal title or interest under such circumstances, "there must be shown either actual fraud, or fault, or negligence equivalent to fraud on his part in concealing his title; or that he was silent when the circumstances would impel an honest man to speak; or such actual intervention on his part as in *Storrs* v. *Barker*, so as to render it just that, as between him and the party acting upon his suggestion, he should bear the loss." What is the reason of this rule? It is accurately explained in the same decision. While the owner of land may by his acts *in pais* preclude himself from asserting his legal title, "it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. *It is opposed to the letter of the statute of frauds*, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character." The most important "ground of justice and equity" admitted by courts of equity to uplift and displace the statute of frauds concerning legal titles to land, by fastening a liability upon the wrong-doer, is fraud. There are many instances in which equity thus compels the owner of land to forego the benefits of his legal title and to admit the equitable claims of another, in direct contravention of the literal requirements of the statute, but they all depend upon the same principle. The rule under consideration is strictly analogous to another familiar rule that a legal owner of land can not be turned into a trustee *ex delicto* by any *mere* words or conduct. A constructive trust *ex delicto* can never be impressed upon land as against the legal title by any verbal stipulation however definite nor by any mere conduct; such trust can only arise where the verbal stipulation and conduct together amount to fraud in the contemplation of equity. Both the rule under consideration and the rule con-

cerning trusts rest upon the same reasons. The doctrine had its origin, as has been said, prior to and independently of the modern doctrine of equitable estoppel by conduct, and was confined in its operation to courts of equity. Even at the present day, this particular instance of the equitable estoppel by which the owner of land is precluded from asserting his legal title, is distinctively equitable; it is not admitted and enforced at law, except in states where the principles of equity are administered through the means of legal actions and remedies, and in those where legal and equitable rights and reliefs are combined in the administration of justice under the reformed procedure.[1]

§ 808. **Requisites, Further Illustrated: The Conduct.**— My limits of space do not permit a detailed discussion of these general requisites. I can only state them in the briefest manner, and must refer to the cases cited in the foot-note, and to treatises upon estoppel, for an ampler treatment. In fact, the more specific rules, the varying phases of opinion, and the partial conflict of decision, have arisen in actions at law rather than in equity. The treatment of the subject by courts of equity has generally been simple, uniform, and consistent. The conduct creating the estoppel must be something which amounts either to a representation or a concealment of the existence of facts; and these facts must be material to the rights or interests of the party affected by the representation or concealment, and who claims the benefit of the estoppel. The conduct may consist of external acts, of language written or spoken, or of silence.[2] The

[1] Trenton Banking Co. v. Sherman, 24 Alb. L. J. 390; Boggs v. Merced M. Co., 14 Cal. 279, 367, 368; Brant v. Va. Coal Co., 3 Otto, 326, 335; Evans v. Bicknell, 6 Ves. 174; Pilling v. Armitage, 12 Id. 78, 84; Martinez v. Cooper, 2 Russ. 198; Nicholson v. Hooper, 4 My. & Cr. 179; Williams v. Earl of Jersey, Cr. & Ph. 91; E. I. Company v. Vincent, 2 Atk. 83; Hungerford v. Earle, 2 Vern. 261; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Storrs v. Barker, 6 Id. 166; actual intent to deceive not always necessary; gross negligence in forgetting a fact contrary to the statement acted upon; Slim v. Croucher, 1 De G. F. & J. 518, 525, 528; but see Spencer v. Carr, 45 N. Y. 406; Sulphine v. Dunbar, 55 Miss. 255; and see Southard v. Sutton, 68 Me. 575; Kirkpatrick v. Brown, 59 Ga. 450; Stewart v. Mix, 30 La. An. (Part. 2) 1036; Lippmins v. McCranie, Id. 1251; Lamar Co. v. Clements, 49 Tex. 347; Bloomstein v. Clees, 3 Tenn. Ch. 433; Hart v. Giles, 67 Mo. 175; Godfrey v. Thornton, 46 Wisc. 677; Gregg v. Von Phul, 1 Wall. 274, *per* Davis, J.; Breeding v. Stamper, 18 B. Mon. 175; Hill v. Epley, 31 Pa. St. 331, 334. This species of equitable estoppel belongs to the jurisdiction of equity, and is not available at law. Wimmer v. Ficklin, 14 Bush, 193; Kelly v. Hendricks, 57 Ala. 193; Hayes v. Livingston 34 Mich. 384.

[2] *Examples by acts or by words.*— Cairncross v. Lorimer, 7 Jur. N. S. 149; Pulsford v. Richards, 17 Beav. 87; Bridger's Case, L. R., 9 Eq. 74; Mitchell's Case, Id., Id. 363; Ebbett's Case, Id., 5 Ch. 302 (cases where a person has allowed his name to appear as a stockholder in a company); Tilton v. Nelson, 27 Barb. 595; Horn v. Cole, 51 N. H. 287, 290; Stevens v. Dennett, 51 Id. 324; Zuchtmann v. Roberts, 109 Mass. 53; Continental B'k v. B'k of Comm'th, 50 N. Y. 575; Barnard v.

facts represented or concealed must, in general, be either existing or past, or at least represented to be so. A statement concerning future facts would either be a mere expression of opinion, or would constitute a contract and be governed by rules applicable to contracts.[1]

§ 809. **Same: Knowledge of the Truth by the Party Estopped.**—The truth concerning these material facts represented or concealed, must be known to the party at the time when his conduct, which amounts to a representation or concealment, takes place; *or else the circumstances must be such that a knowledge of the truth is necessarily imputed to him.*[2] The rule has sometimes been stated, as though it were universal, that an actual knowledge of the truth is always indispensable. It is, however, subject to so many restrictions and limitations, as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence.[3] It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he *ought* to have known them, so that knowledge will be imputed to him. In such case, ignorance or mistake will not prevent an estoppel.[4] Nor does the rule apply to a

Campbell, 55 Id. 456; Dezell v. Odell, 3 Hill, 215; Oakland P. Co. v. Rier, 52 Cal. 270; Dresbach v. Minnis, 45 Id. 223; Comstock v. Smith, 26 Mich. 306; Peters v. Jones, 35 Iowa, 512; Thomas v. Pullis, 56 Mo. 211; Rice v. Groffman, Id. 434, 435; People v. Brown, 67 Ill. 435; Connihan v. Thompson, 111 Mass. 270 (not estopped); McKinzie v. Steele, 18 Ohio St. 38, 41 (not estopped); Eaton v. New Eng. Tel. Co., 68 Me. 523; Southard v. Sutton, 68 Id. 575; Reed v. Crapo, 127 Mass. 39; Taylor v. Brown, 31 N. J. Eq. 163 (not estopped); Board of Trustees etc. v. Serrett, 31 La. An. 719; Jeffries v. Clark, 23 Kans. 448; Hartshorn v. Potroff, 89 Ill. 509; Talcott v. Brackett, 5 Ill. App. 60.

Examples by silence.—Cairncross v. Lorimer, 7 Jur. N. S. 149; Gregg v. Wells, 10 A. & E. 90; Gregg v. Von Phul, 1 Wall. 274; Railroad Co. v. Dubois, 12 Id. 47; Rubber Co. v. Goodyear, 9 Id. 788; Niven v. Belknap, 2 Johns. 573; Hall v. Fisher, 9 Barb. 17, 31; Hope v. Lawrence, 50 Id. 258; Chapman v. Chapman, 59 Pa. St. 214; Lawrence v. Luhr, 65 Id. 236; Hill v. Epley, 31 Id. 331, 334; Ives v. North Canaan, 33 Conn. 402; Taylor v. Ely, 25 Id. 250; Guthrie v. Quinn, 43 Ala. 561; Abrams v. Scale, 44 Id. 297; Young v. Vough, 23 N. J. Eq. (8 C. E. Green), 325; Weber v. Weatherby, 34 Md. 656; Silloway v. Neptune Ins. Co., 12 Gray, 73; Society etc. v. Lehigh Valley R. R., 32 N. J. Eq. 329; Viele v. Judson, 82 N. Y. 32, 39; Hamlin v. Sears, 82 Id. 327.

[1] Jorden v. Money, 5 H. L. Cas. 185; Langdon v. Doud, 10 Allen, 433; 6 Id. 423; White v. Walker, 31 Ill. 422, 437; White v. Ashton, 51 N. Y. 280.

[2] Holmes v. Crowell, 73 N. C. 613; Stevens v. Dennett, 51 N. H. 324, 333; Smith v. Hutchinson, 61 Mo. 83; Clark v. Coolidge, 8 Kans. 189; Second Nat. B'k v. Walbridge, 19 Ohio St. 419; Adams v. Brown, 16 Id. 75; B'k of Hindustan, L. R., 6 C. P. 54, 222; Laverty v. Moore, 33 N. Y. 658; Reed v. McCourt, 41 Id. 435; Raynor v. Timerson, 51 Barb. 517; Strong v. Ellsworth, 26 Vt. 366; Thrall v. Lathrop, 30 Id. 307; Whitaker v. Williams, 20 Conn. 98; Liverpool Wharf v. Prescott, 7 Allen, 494; 4 Id. 22; Kincaid v. Dormey, 51 Mo. 552; Rutherford v. Tracy, 48 Id. 325; Dorlarque v. Cress, 71 Ill. 380, 382; Graves v. Blondell, 70 Me. 190.

[3] See cases in last note.

[4] Irving Nat. B'k v. Alley, 79 N. Y. 536, 540; Pulsford v. Richards, 17 Beav. 87; Lefever v. Lefever, 30 N. Y.

party who has not simply acquiesced, but who has actively interfered by acts or words, and whose affirmative conduct has thus misled another.[1] Finally, the rule does not apply, even in cases of mere acquiescence, when the ignorance of the real facts was occasioned by culpable negligence.[2]

§ 810. **Same: Ignorance of the Truth by the Other Party.**—The truth concerning these material facts must be unknown to the other party claiming the benefit of the estoppel, not only at the time of the conduct which amounts to a representation or concealment, but also at the time when that conduct is acted upon by him. If, at the time when he acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he can not claim to have been misled by relying upon the representation or concealment.[3] If, therefore, at the time of the representation the party to whom it was made was ignorant of the real facts, but before he acted upon it, the statement was contradicted by its author, or he became informed of the truth, he could not claim an estoppel.[4] It has been said that, in cases of alleged estoppel by conduct affecting the title to land, the record of the real title would furnish a means by which the other party might ascertain the truth, so that he could not claim to be misled, and could not insist upon an estoppel.[5] This conclusion, if correct at all, is correct only within very narrow limits, and must be applied with the great-

27; Horn v. Cole, 51 N. H. 287, *per* Perley, C. J.; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583, 585, 586.

[1] In such a case the party might not only be ignorant or mistaken, but he might even believe his own statements to be true. This is a plain application of the principle that where one of two innocent persons must suffer, the loss will fall upon him whose conduct made it possible: Hurd v. Kelly, 78 N. Y. 588, 597; Irving Nat. B'k v. Alley, 79 Id. 536, 540; Cloud v. Whiting, 38 Ala. 57; Beaupland v. McKeen, 4 Casey, 124, 131; Millingar v. Sorg, 55 Pa. St. (5 P. F. Sm.) 215, 225.

[2] Sweezey v. Collins, 40 Iowa, 540; Rice v. Bunce, 49 Mo. 231, 234; Calhoun v. Richardson, 30 Conn. 210; Preston v. Mann, 25 Id. 118; Smith v. Newton, 38 Ill. 230; Stone v. Gr. West. Oil Co., 41 Id. 85; Slim v. Croucher, 1 De G. F. & J. 518; and see Adams v. Brown, 16 Ohio St. 75.

[3] Davenport v. Turpin, 52 Cal. 270; Brant v. Virginia Coal etc. Co., 3 Otto, 326; Holmes v. Crowell, 73 N. C. 613; Plummer v. Mold, 22 Minn. 15; Clark v. Coolidge, 8 Kans. 189; Bigelow v. Topliff, 25 Vt. 273; Odlin v. Gove, 41 N. H. 465; Wallis v. Truesdell, 6 Pick. 455; Carter v. Champion, 8 Conn. 548, 554; Rapalee v. Stewart, 27 N. Y. 310; Hill v. Epley, 7 Casey, 331; Fisher v. Mossman, 11 Ohio St. 42; Bales v. Perry, 51 Mo. 449; Rennie v. Young, 2 De G. & J. 136; Wythe v. City of Salem, 4 Sawyer, 88; Stevens v. Dennett, 51 N. H. 324, 333; Rice v. Bunce, 49 Mo. 231, 234; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583.

[4] Freeman v. Cooke, 2 Exch. 654; and see Howard v. Hudson, 2 E. & B. 1.

[5] Hill v. Epley, 7 Casey, 331; Knouff v. Thompson, 4 Harris, 357; Goundie v. Northampton W. Co. 7 Barr. 233; Fisher v. Mossman, 11 Ohio St. 42.

est caution. It must be strictly confined to cases where the conduct creating the alleged estoppel is mere silence. If the real owner resorts to any affirmative acts or words, or makes any representation, it would be in the highest degree inequitable to permit him to say that the other party who had relied upon his conduct and had been misled thereby, might have ascertained the falsity of his representations.[1]

§ 811. **Same: Intention of the Party Who is Estopped.**—It has frequently been said, in most general terms, that the conduct amounting to a representation, in order to constitute an estoppel, must be done with the intention, by the one who is to be estopped, that it shall be acted upon by the very person who claims the benefit of the estoppel—or, as is sometimes said, that it shall be acted upon by another person. In short, there must always be the intention, that the conduct shall be acted upon either by some person, or by the very person who afterwards relies upon the estoppel.[2] While such intention must sometimes exist, and while the proposition is therefore true in certain cases, it would be very misleading as a universal rule. In many familiar species of estoppels no intention can possibly exist. The requisite, as applicable to them, is well expressed by an eminent judge in a recent decision. It is not "necessary in equity, that the intention should be to mislead any particular individual or individuals. If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth can not be denied by the party that has made them, against any one who has trusted to them and acted on them. Where a man makes a statement in a manner and under circumstances such as he must understand those who heard the state-

[1] The principle upon which this conclusion depends is fully discussed in the subsequent chapter upon fraud, under the head of representations. See Storrs v. Barker, 6 Johns. Ch. 166; Davis v. Handy, 37 N. H. 65; Hill v. Epley, 7 Casey, 331; Proctor v. Keith, 12 B. Mon. 252; Colbert v. Daniel, 32 Ala. 314, 316; Clapham v. Shillito, 7 Beav. 146, 149, 150, *per* Lord Langdale; Drysdale v. Mace, 2 Sm. & Giff. 225, 230; Price v. Macauley, 2 De G. M. & G. 339, 346, *per* Knight Bruce, L. J.; Wilson v. Short, 6 Hare, 366, 378; Harnett v. Baker, L. R., 20 Eq. 50. Although these cases are not decided upon the doctrine of estoppel, yet they well illustrate the question, how far a person may avoid the effect of his own positive representations, by insisting that the other party should not have relied on them.

[2] Turner v. Coffin, 12 Allen, 401; Pierce v. Andrews, 6 Cush. 4; Kuhl v. Mayor etc., 23 N. J. Eq. (8 C. E. Green), 84, 85; Wilcox v. Howell, 44 N. Y. 398; Brown v. Bowen, 30 Id. 519; Holdane v. Cold Spring, 21 Id. 474; Carroll v. Manchester etc. R. R., 111 Mass. 1; Clark v. Coolidge, 8 Kans. 189, 195; Stevens v. Dennett, 51 N. H. 324, 333; McCabe v. Raney, 32 Ind. 309; Simpson v. Pearson, 31 Id. 1, 5; Eaton v. New Eng. Tel. Co., 68 Me. 63; Southard v. Sutton, 68 Id. 575.

ment would believe to be true, and, if they had an interest in the subject-matter, would act on as true; and one, using his means of knowledge with due diligence, acts on the statement as true, the party who makes the statement can not show that his representation was false, to the injury of the party who believed it to be true, and acted on it as such; that he will be liable for the natural consequences of his representation, and can not be heard to say that the party injured was not the one he meant should act."[1] This mode of stating the doctrine *may* in equity, apply to every kind of estoppel, even to those by which an owner of land is precluded from asserting his legal title. There is, however, a large class in which not only an intention directed towards a particular individual or towards individuals in general, is absent, but a contrary intention that the party's representation is not to be acted upon at all, may be present. The class includes all those instances where an owner of things in action or of chattels, has either designedly or negligently clothed a third person with the *apparent* title and power of disposition, and this person transfers them to a purchaser in good faith who relies upon the apparent power of sale they conferred upon him. The original owner is estopped by his conduct from asserting his right of property, and the *bona fide* purchaser acquires a perfect title by estoppel, in direct contravention of the rules of law which would otherwise control. It is a complete misconception to say that these instances do not depend upon the doctrine of equitable estoppel, but upon that of negligence. On the contrary they have been uniformly rested by courts upon the theory of estoppel, and are among the strongest and most distinctive illustrations of the efficacy of that theory. In fact, *it is only by means of the doctrine of estoppel*, that the original owner can be divested of his title in opposi-

[1] Horn v. Cole, 51 N. H. 287, *per* Perley, C. J.: The same doctrine was laid down in Cornish v. Abington, 4 H. & N. 549, by Pollock, C. B. "If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, can not afterwards gainsay the reasonable inference to be drawn from his words or conduct." To the same effect are Freeman v. Cooke, 2 Exch. 654, *per* Parke, B.; Howard v. Hudson, 2 E. & B. 1; *In re* Bahia & S. F. R'y, L. R., 3 Q. B. 584, *per* Cockburn, C. J. As illustrations see Young v. Grote, 4 Bing. 253; B'k of Ireland v. Evans, 5 H. L. Cas. 389; Swan v. Br. & Austr. Co., 7 C. B. (N. S.) 400; 7 H. & N. 603; 2 H. & C. 175; Halifax Guardians v. Wheelwright, L. R., 10 Exch. 183; Carr v. Lond. & N. W. R'y, L. R., 10 C. P. 307, 316, 317; Anderson v. Armstead, 69 Ill. 452, 454; Rice v. Bunce, 49 Mo. 231, 234, *per* Wagner, J.; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583, 585; Man. & Trad. B'k v. Hazard, 30 N. Y. 226, 230.

tion to the rules of the law concerning the transfer and acquisition of property. *There is no rule of law or of equity, by which an owner through mere negligence can be divested of his legal title to things in action or chattels.*[1] The cases where the particular intention, mentioned in the general rule, seems to be the most essential, are those in which an owner or one having an interest in property, especially in land, deals concerning it directly with a third person, and by his words, acts, or silence when he ought to speak, makes representations with respect to his title or interest. In order to be estopped from asserting his title or interest, he must intend that his representation should be acted upon by the party influenced by his conduct.[2]

§ 812. **Same: The Conduct must be Relied upon, and be an Inducement for the Other Party to Act.**—Whatever may be the real intention of the party making the representation, it is absolutely essential that this representation, whether consisting of words, acts, or silence, should be believed and relied upon as the inducement for action by the party who claims the benefit of the estoppel, and that so relying upon it, and induced by it, he should take some action. The cases all agree that there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action.[3] Finally, this action must be of such a nature that it would have altered the legal

[1] Examples of this rule as applied to certificates of stock and other things in action. McNeil v. Tenth Nat. B'k, 46 N. Y. 325; Moore v. Metropolitan B'k, 55 Id. 41; Combes v. Chandler, 33 Ohio St. 178; and see *ante*, § 710, where these and other cases are fully stated. *As applied to other property.* Barnard v. Campbell, 55 N. Y. 456, 462; Man. & Trad. B'k v. Hazard, 30 Id. 226, 230; Anderson v. Armstead, 69 Ill. 452, 454; Hamlin v. Sears, 82 N. Y. 327. This class of estoppels is virtually the same as that described by Sir James Fitzjames Stephen, in the second paragraph of his general formula quoted *ante*, in note under § 804, except that *negligence* of the owner is not always a necessary element. See the English cases there cited, and also in the last preceding note.

[2] See *ante*, § 807, and cases cited in note.

[3] Howard v. Hudson, 2 E. & B. 1; Curnen v. The Mayor, 79 N. Y. 511, 514; Waring v. Somborn, 82 Id. 604; Grissler v. Powers, 81 Id. 57; Kent v. Quicksilver M. Co., 78 Id. 159, 187; Hurd v. Kelly, Id. 588, 597; Barnard v. Campbell, 55 Id. 456, 462; Malloney v. Horan, 49 Id. 111, 115; Jewett v. Miller, 10 Id. 402, 406; Man. & Trad. B'k v. Hazard, 30 Id. 226, 230; Van Deusen v. Sweet, 51 Id. 378; Davenport v. Turpin, 43 Cal. 597, 602; Wheelock v. Town of Hardwick, 48 Vt. 19; St. Jo. Man. Co. v. Daggett, 84 Ill. 556; Dorlarque v. Cress, 71 Ill. 380; Anderson v. Armstead, 69 Ill. 452; Carroll v. Manchester etc. R. R., 111 Mass. 1; Voorhees v. Olmstead, 3 Hun, 744; Horn v. Cole, 51 N. H. 287; Stevens v. Dennett, 51 Id. 324, 333; Clark v. Coolidge, 8 Kans. 189, 195; Kuhl v. The Mayor, 23 N. J. Eq. 84; Rice v. Bunce, 49 Mo. 231, 234; State v. Laies, 52 Id. 396; McCabe v. Raney, 32 Ind. 309; Simpson v. Pearson, 31 Id. 1, 5; McKinzie v. Steele, 18 Ohio St. 38, 41; Eaton v. N. E. Tel. Co., 68 Me. 63; Southard v. Sutton, 68 Id. 575; Graves v. Blondell, 70 Id 190; Mut. Life Ins. Co. v. Norris, 31 N. J. Eq. 583; Eitel v. Bracken, 38 N. Y. Super. Ct. 7.

position of the party for the worse, unless the estoppel is enforced. He must have placed himself in such a situation, that he would suffer a loss as the consequence of his action, if the other party were allowed to deny the truth of his representation or repudiate the effects of his conduct.[1] Although this action is usually affirmative, yet such affirmative action is not indispensable. It is enough if the party has been induced to *refrain* from using such means, or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.[2]

§ 813. **Operation and Extent of the Estoppel.**—The measure of the operation of an estoppel is the extent of the representation made by one party and acted on by the other. The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true.[3] With respect to the persons who are bound by or who may claim the benefit of the estoppel, it operates between the immediate parties and their privies, whether by blood, by estate, or by contract. A stranger, who is not a party nor a privy, can neither be bound nor aided.[4] Since the whole doctrine is a creature of equity and governed by equitable principles, it necessarily follows, that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence, otherwise no equity will arise in his favor.[5]

§ 814. **Same: As Applied to Married Women.**—Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is

[1] Cases cited in last note; also Forsyth v. Day, 46 Me. 176, 197; Cummings v. Webster, 43 Id. 192; Holden v. Torrey, 31 Vt. 690; Bitting's Appeal, 5 Harris, 211; Cole v. Bolard, 10 Id. 431; Newman v. Edwards, 10 Casey, 32; Truan v. Keiffer, 31 Ala. 136; Railroad Co. v. Dubois, 12 Wall. 47; East v. Dolihite, 72 N. C. 562.

[2] Continental B'k v. Bank of Comm'th, 50 N. Y. 575, and cases cited by Folger, J.; Voorhees v. Olmstead, 3 Hun, 744.

[3] Grissler v. Powers, 81 N. Y. 57, *per* Andrews, J.; Tilton v. Nelson, 27 Barb. 595; Pickett v. Merch. Nat. B'k, 32 Ark. 346; Murray v. Jones, 50 Ga. 109; Campbell v. Nichols, 33 N. J. L. (4 Vroom), 81; Philadelphia v. Williamson, 10 Phila. 176; Dunston v. Paterson, 2 C. B. (N. S.) 495.

[4] Simpson v. Pearson, 31 Ind. 1, *per* Elliott, C. J.; Eaton v. N. E. Tel. Co., 68 Me. 63; Southard v. Sutton, 68 Id. 575; Wright v. Hazen, 24 Vt. 143; Parker v. Crittenden, 37 Conn. 148; McCravey v. Remson, 19 Ala. 430; Kinnear v. Mackey, 85 Ill. 96; Murray v. Sells, 53 Ga. 257; Peters v. Jones, 35 Iowa, 512; Thistle v. Buford, 50 Mo. 278; Gould v. West, 32 Tex. 338.

[5] Thorne v. Mosher, 20 N. J. Eq. (5 C. E. Green), 257; Royce v. Watrous, 73 N. Y. 597; Wilcox v. Howell, 44 Id. 398; Moore v. Bowman, 47 N. H. 494.

strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single.[1] Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right, or to maintain a defense.[2] There are, however, decisions which hold in effect, that since a married woman can not be directly bound by her contracts or conveyances, even when accompanied with fraud, so she can not be indirectly bound through means of an estoppel; and the operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct upon which the other party has relied.[3] These decisions seem to be in opposition to the general current of authority.

§ 815. **Same: As Applied to Infants.**—The disability of infancy seems to have limited the operation of the equitable estoppel more than that of coverture. Since an infant is not directly bound by his ordinary contracts unless ratified after he becomes of age, so obligations in the nature of contract will not be indirectly enforced against him by means of an estoppel created by his conduct while still a minor. On the other hand, an equitable estoppel arising from his conduct may be interposed, with the same effect as though he were adult, to prevent

[1] Wherever statutes have gone further and enabled married women to enter into contracts as though single, there is, of course, no reason why the doctrine of estoppel should not apply to them without any limitation. Dingens v. Clancey, 67 Barb. 566; Fryer v. Rishell, 84 Pa. St. 521; Towles v. Fisher, 77 N. C. 437; Godfrey v. Thornton, 46 Wisc. 677; and even she may thus be estopped by the acts of her husband. McCaa v. Woolf, 42 Ala. 389; Bodine v. Killeen, 53 N. Y. 93; Treman v. Allen, 15 Hun, 4; Hockett v. Bailey, 86 Ill. 74; but see, for circumstances in which she has been held not estopped, Oglesby Coal Co. v. Pasco, 79 Ill. 164; Upshaw v. Gibson, 53 Miss. 341; McBeth v. Trabue, 69 Mo. 642.

[2] This is certainly the effect of modern English decisions. Stafford v. Stafford, 1 De G. & J. 193; Skottowe v. Williams, 7 Jur. (N. S.) 118; Jones v. Higgens, L. R., 2 Eq. 538, 544; Jones v. Frost, L. R., 7 Ch. 773, 776; Bigelow v. Foss, 59 Me. 162; Frazier v. Gelston, 35 Md. 298; Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. (8 C. E. Green) 477, 483; Carpenter v. Carpenter, 25 Id. (10 Id.) 194; Drake v. Glover, 30 Ala. 382; Connolly v. Branstler, 3 Bush, 702; Couch v. Sutton, 1 Grant's Cas. 114; McCullough v. Wilson, 9 Harris, 436; and see the cases cited in the last note.

[3] Lowell v. Daniels, 2 Gray, 161; Merriam v. Boston R. R., 117 Mass. 241; Bemis v. Call, 10 Allen, 512; Oglesby Coal Co. v. Pasco, 79 Ill. 164; Kane Co. v. Herrington, 50 Id. 232; Williams v. Baker, 71 Pa. St, (21 P. F. Sm.) 476; Glidden v. Strupler, 52 Id. (2 Id.) 400; Rumfelt v. Clemens, 10 Wright, 455; Keen v. Hartman, 12 Id. 497. In Lowell v. Daniels, *supra*, this view was maintained with great force and ability.

him from affirmatively asserting a right of property or of contract in contravention of his conduct upon which the other party has relied and been induced to act.[1]

§ 816. **Important Applications in Equity. Acquiescence.**—In addition to the foregoing discussion of principles, I shall state very briefly some of the applications which have most frequently been made by courts of equity. Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxims, He who seeks equity must do equity, and He who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a *quasi* estoppel—upon the rights of remedy. These two effects will be described separately.

§ 817. **Acquiescence as Preventing Rights of Remedy.** Acquiescence in the wrongful conduct of another by which one's rights are invaded, may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of *quasi* estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone. In order that this effect may be produced, the acquiescence must be with knowledge of the wrongful acts themselves, and of their injurious consequences; it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity against him, after he has been suffered to go on unmolested, and his conduct apparently acquiesced in. It follows that what will amount to a sufficient acquiescence in any particular case, must largely depend upon its own special circumstances. The equitable remedy to which this *quasi* estoppel by acquiescence most frequently applies, is that of injunction, preliminary or final, when sought by a proprietor to restrain a defendant from interference with easements, from committing nuisances, from

[1] Dorlarque v. Cress, 71 Ill. 380; McBeth v. Trauhe, 69 Mo. 642; Montgomery v. Gordon, 51 Ala. 377; Upshaw v. Gibson, 53 Miss. 341; Handy v. Noonan, 51 Id. 166; Padfield v. Pierce, 72 Ill. 500; Wilkinson v. Filby, 24 Wisc. 441; Wilie v. Brooks, 45 Miss. 542; Drake v. Wise, 36 Iowa, 476; Tantum v. Coleman, 26 N. J. Eq. (11 C. E. Green), 128; Overton v. Banister, 3 Hare, 503; *Ex parte* Unity etc. Ass'n, 3 De G. & J. 63; Nelson v. Stocker, 4 Id. 458; Esron v. Nicholas, 1 De G. & Sm. 118; Stikeman v. Dawson, 1 Id. 90; Wright v. Snowe, 2 Id. 321; Thompson v. Simpson, 2 Jo. & Lat. 110.

trespasses, or other like acts in derogation of the plaintiff's proprietary rights.[1] This effect of delay is subject to the important limitation that it is properly confined to claims for purely equitable remedies to which the party has no strict legal right. Where an injunction is asked in support of a strict *legal* right, the party is entitled to it if his legal right is established; mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself.[2] The same rule applies, and for the same reasons, to a party seeking purely equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction, and the like. Upon obtaining knowledge of the facts, he should commence the proceedings for relief as soon as reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge, will defeat the equitable relief.[3]

§ 818. **Acquiescence as an Estoppel to Rights of Property or of Contract.**—Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest

[1] See vol. 1, §§ 418, 419, and cases there cited. The following cases furnish illustrations of the rule and of its limitations, when it does or does not operate: Coles v. Sims, 5 De G. M. & G. 1; Great West. R'y v. Oxford etc. R'y, 3 Id. 341; Att'y-gen. v. Sheffield Gas Co., 3 Id. 304; Child v. Douglas, 5 Id. 739; Graham v. Birkenhead etc. Ry., 2 Macn. & G. 146; Buxton v. James, 5 De G. & Sm. 80; Att'y-gen. v. Eastlake, 11 Hare, 205, 228; 17 Jur. 801; Wood v. Sutcliffe, 2 Sim. (N. S.) 163; Rochdale Canal Co. v. King, 2 Id. 78; Cooper v. Hubbuck, 30 Beav. 160; 7 Jur. N. S. 457; Bankart v. Houghton, 27 Beav. 425; Gordon v. Cheltenham R'y, 5 Id. 229, 237; Mitchell v. Steward, L. R., 1 Eq. 541; Western v. McDermot, L. R., 1 Eq. 499; 2 Ch. 72; Senior v. Pawson, L. R., 3 Eq. 330; Smith v. Smith, 20 Id. 500; Att'y-gen. v. Lunatic Asyl., L. R., 4 Ch. 146. Lee v. Haley, 5 Id. 155; Gaunt v. Fynney, 8 Id. 8; Bassett v. Salisbury Man. Co., 47 N. H. 426, 439; Odlin v. Gove, 41 Id. 465; Peabody v. Flint, 6 Allen, 52, 57; Fuller v. Melrose, 1 Id. 166; Tash v. Adams, 10 Cush. 252; Briggs v. Smith, 5 R. I. 213; Grey v. Ohio etc. R. R., 1 Grant's Cas. 412; Little v. Price, 1 Md. Ch. 182; Burden v. Stein, 27 Ala. 104; Pillow v. Thompson, 20 Tex. 206; Borland v. Thornton, 12 Cal. 440; Phelps v. Peabody, 7 Cal. 50; Wilson v. Cobb, 28 N. J. Eq. 177.

[2] Fullwood v. Fullwood, L. R., 9 Ch. D. 176; and see Gaunt v. Fynney, L. R., 8 Ch. 8.

[3] Jennings v. Broughton, 5 De G. M. & G. 126; Farebrother v. Gibson, 1 De G. & J. 602; Kempson v. Ashbee, L. R., 10 Ch. 15; Turner v. Collins, 7 Id. 329; Payne v. Evens, L. R., 18 Eq. 356; Peek v. Gurney, L. R., 13 Eq. 79; Kent v. Freehold etc. Co., L. R., 3 Ch. 493; Oakes v. Turquand, L. R., 2 H. L. 325; Parks v. Evansville R. R., 23 Ind. 567; Gatling v. Newell, 9 Ind. 572. The same rule may be applied to other equitable remedies under analogous circumstances. See Reimers v. Druce, 23 Beav. 145; Hicks v. Hunt, Johns. 372; Chapman v. Railroad Co., 6 Ohio St. 119; Hathaway v. Noble, 55 N. H. 508; and see cases cited *post* under § 819.

upon the principle: "If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent."[1] A most important application includes all cases where an owner of property, A., stands by and knowingly permits another person, B., to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like. Of course, it is essential that B. should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his own dealing.[2]

§ 819. **Estoppel as Applied to Corporations and Stockholders.**—This species of estoppel, as well as other kinds which consist of affirmative acts or representations, applies to corporations in their dealings with third persons, and with their own stockholders.[3] Thus, a corporation may be estopped by statements contained in a prospectus or circular, on behalf of a stockholder who has purchased shares upon the faith of such statements.[4] Conversely stockholders may be estopped by their acquiescence from objecting to the acts of the corporation which are not illegal nor *mala prohibita*, but *ultra vires*, when the rights of innocent third persons have intervened. Express assent is not necessary to estop the stockholders; "when they neglect to promptly and actively condemn the unauthorized act, and to seek judicial relief after knowledge of its being done, they will be deemed to have acquiesced, and will be estopped as against innocent third persons."[5]

[1] Mich. etc. Co. v. Parcell, 38 Mich. 475, 480, *per* Cooley, J.

[2] Crook v. Corp'n of Seaford, L. R., 6 Ch. 551; 10 Eq. 678; Thornton v. Ramsden, 4 Giff. 519; Nunn v. Fabian, 11 Jur. N. S. 868; Rennie v. Young, 2 De G. & J. 136; Bankart v. Tennant, L. R., 10 Eq. 141; Davies v. Sear, 7 Id. 427; Davies v. Davies, 6 Jur. N. S. 1320; Somersetshire etc. Co. v. Harcourt, 2 De G. & J. 596; Duke of Beaufort v. Patrick, 17 Beav. 60; Schaefer v. Gildea, 3 Col. 15; Mich. etc. Co. v. Parcell, 38 Mich. 475; Cumberland V. R. R. v. McLanahan, 59 Pa. St. (9 P. F. Sm.) 23; Martin v. Righter, 2 Stockt. Ch. 510; Blackwood v. Jones, 4 Jones' Eq. 54; Donovan v. Fireman's Ins. Co., 30 Md. 155; Evansville v. Pfisterer, 34 Ind. 36; Millingar v. Sorg, 61 Pa. St. (11 P. F. Sm.) 471; Raritan Water P. Co. v. Veghte, 21 N. J. Eq. (6 C. E. Green), 463; Brooks v. Curtis, 4 Lans. 283; Vicksburg etc. R. R. v. Ragsdale, 54 Miss. 200; Broyles v. Nowlen, 59 Tenn. (Baxt.) 191; Hart v. Giles, 67 Mo. 175; Hayes v. Livingston, 34 Mich. 384; Ford v. Loomis, 33 Id. 121.

[3] Curnen v. Mayor etc., 79 N. Y. 511, 514; Continental B'k v. B'k of the Comm'th, 50 Id. 575; Wilson v. West Hartlepool Ry., 11 Jur. N. S. 124; Hill v. South Stafford Ry., 11 Id. 192; Ins. Co. v. Eggleston, 6 Otto, 572.

[4] New Bruns. etc. Co. v. Muggeridge, 7 Jur. N. S. 132. And it is not necessary that the officers of the company should have known the falsity of the statements, or disbelieved them.

[5] Kent v. Quicksilver Min. Co., 78 N. Y. 159, 187, 188, and cases cited; Zabriskie v. Cleveland R. R., 23 How. (U. S.) 381, 395, 398; Parks v. Evansville R. R., 23 Ind. 567; Evans v. Smallcombe, L. R., 3 H. L. 249; 3 Eq. 769; Brotherhood's Case, 31 Beav. 365; *In*

§ 820. **Other Instances of Acquiescence.**—It is in conformity with the same principle, that parties who have long acquiesced in settlements of accounts or of other mutual dealings, are not permitted to re-open or disturb them; and this is true even though the parties stood in confidential relations towards each other, as trustee and *cestui que trust*, principal and agent, and the like, and the settlement embraced matters growing out of such relations.[1] Another familiar instance of the estoppel arises from the conduct of the debtor party towards the intended assignee of a thing in action. If a mortgagor, obligor, or other debtor, by keeping silence under circumstances when he ought to speak, leads the intended assignee to believe that there is no defense, he will be estopped from afterwards setting up any defense which might otherwise be available, as against the assignee who has thus been induced to purchase the demand. The estoppel will be even more obvious, when the debtor, instead of simply keeping silent, resorts to affirmative and misleading acts or representations.[2]

§ 821. **Owner Estopped from Asserting his Legal Title to Land.**—The most striking instance of the estoppel recognized by courts of equity, is that already described in a former paragraph, wherein by intentional misrepresentation, misleading conduct, or wrongful concealment, a party may preclude himself from asserting his legal title to land, or from enforcing an incumbrance on, or maintaining an interest in real estate.[3] This doctrine was established in equity long before the modern rules concerning equitable estoppel by conduct had been developed; and its operation is somewhat more extensive than the effects produced by the ordinary forms of estoppel. A person may not only be prevented from asserting his title or interest; he may even be compelled, at the suit of an innocent purchaser, to make good and specifically perform his representations. Fraud, actual or constructive, is the essential and central element.

re Magdalena etc. Co., 6 Jur. (N. S.) 975; and see Sharpley v. Louth etc. Ry., L. R., 2 Ch. D. 663, 681; Scholey v. Central etc. Co., Id., 9 Eq. 266, n.; Ashley's Case, Id. 263; Denton v. Macniel, 2 Id. 352; Hallows v. Fernie, L. R., 3 Ch. 467.

[1] Bright v. Legerton, 6 Jur. (N. S.) 1179; Clarke v. Hart, 5 Id. 447. See the remarks of Lord Chelmsford in this case upon the different effects of delay and acquiescence upon executed and executory interests.

[2] Lee v. Kirkpatrick, 1 McCarter, 264; Grissler v. Powers, 81 N. Y. 57; and see cases cited *ante*, § 704.

[3] See *ante*, § 807 and cases cited; Vicksburg etc. R. R. v. Ragsdale, 54 Miss. 200; Sulphine v. Dunbar, 55 Id. 255; Wilber v. Goodrich, 34 Mich. 84; Sherrill v. Sherrill, 73 N. C. 8; Mayer v. Ramsey, 46 Tex. 371; Hayes v. Livingston, 34 Mich. 384; Willmott v. Barber, L. R., 15 Ch. D. 96, 106.

CHAPTER THIRD.

CERTAIN FACTS AND EVENTS WHICH ARE THE OCCASIONS OF EQUITABLE PRIMARY OR REMEDIAL RIGHTS.

§ 822. **Introductory**.—In the first volume, while speaking of the jurisdiction, I stated that certain facts and events were most important *occasions* of equitable rights and duties.[1] Since these same facts are also recognized by courts of law as giving rise to legal rights and duties, within a limited extent, it has sometimes been said that they form a part of the concurrent jurisdiction of equity. The erroneous character of this theory has been shown in earlier sections. The rights and duties, of which they are the occasions, whether of property, of contract, or of remedy, belong partly to the exclusive and partly to the concurrent jurisdiction. The facts and events referred to, and which form the subject-matter of this chapter, are accident, mistake, and fraud. In the present discussion I shall not describe, in an exhaustive manner, all their consequences and effects, for this would produce needless confusion. I shall, in the first place, define them as they are conceived of by equity, and explain with some care the equitable notions concerning their nature, and the equitable doctrines concerning their essential elements and attributes. In the second place, I shall enumerate their effects, the instances of equitable jurisdiction of which they are the occasions, and the equitable rights and duties which are maintained and enforced by these phases of the jurisdiction. The doctrines which determine and govern the most important of these rights will be more fully discussed under subsequent and appropriate heads.[2]

SECTION I.

ACCIDENT.

ANALYSIS.

§ 823. Definition.
§ 824. *Rationale* of the jurisdiction.
§ 825. General limitations on the jurisdiction.
§§ 826–829. Instances in which the jurisdiction does not exist.

[1] See *ante*, §§ 359, 362.

[2] For example many instances of trusts by operation of law spring from fraud; their full discussion will be found in the sections on trusts. All the distinctive remedies, such as cancellation, reformation, etc., will be examined in the division which deals with remedies.

§ 826. Non-performance of contracts.
§ 827. Supplying lost or destroyed records.
§ 828. Other special instances.
§ 829. Parties against whom the jurisdiction is not exercised.
§§ 830–837. Particular instances of the jurisdiction.
§ 831. 1. Suits on lost instruments.
§ 832. Same; instruments not under seal.
§ 833. 2. Accidental forfeitures.
§ 834. 3. Defective execution of powers.
§ 835. Powers held in trust will be enforced.
§ 836. 4. Relief against judgments at law.
§ 837. 5. Other special instances.

§ 823. **Definition.**—It is confessedly difficult to define accident so as to include all the elements essential to the equitable conception, and to exclude all others; and many writers have not attempted to give a definition. The following expresses, I think, the true meaning given by equity to the term as an occasion for the exercise of jurisdiction. Accident is an unforeseen and unexpected event, occurring external to the party affected by it, *and of which his own agency is not the proximate cause*, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain.[1] If the party's own agency is the proximate cause of the event, it is a mistake rather than an accident. This definition purposely excludes all fortuitous occurrences which do not occasion any exercise of jurisdiction, since they are not "accidents" within the equitable conception.

§ 824. **Rationale of the Jurisdiction.**—Accident is one of

[1] Jeremy, in his Eq. Jurisd. defines accident as "an occurrence in relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law." Bk. 3, Pt. 2. Judge Story justly objects to this definition as defective and too narrow. He gives the following: "By the term accident is intended, not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct of the party." Story's Eq. § 78. This definition is more inaccurate than that of Mr. Jeremy. It not only includes cases which are not accidents at all but mistakes, but it omits the very central element of the equitable conception. So far as it is a definition, it is one of the word in its popular, and not its technical sense. Another author, with a nearer approach to its true signification in equity, calls it "an unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct." Manual of Eq. by Smith, p. 36. Few judges have attempted any definition. In Earl of Bath v. Sherwin, 10 Mod. 1, 3, Lord Chan. Cowper said: "By accident is meant when a case is distinguished from others of a like nature by unusual circumstances." This statement as a definition is so imperfect and inaccurate as to be entirely worthless.

the oldest heads of equity jurisdiction. There is reason to believe that, at an early day, this jurisdiction was much more undefined and comprehensive than it is at present; but for a long time it has been, and is now, settled within certain and somewhat narrow limits. Its existence and exercise involve two essential requisites. The first and principal requisite is, that, by the event not expected nor foreseen, one party A. has without fault and undesignedly undergone some legal loss or liability, and the other party, B., has acquired a corresponding legal right, which it is contrary to good conscience for him to retain and enforce against A. In other words, because of the unexpected character of the occurrence by which A.'s legal relations towards B. have been unintentionally changed, A. is in good conscience entitled to relief which shall restore those relations to their original character, and replace him in his former position. In the second place, this relief, to which A. is conscientiously entitled, must be such as can not be adequately conferred by courts of law. Upon these two essential requisites the jurisdiction was based: the party's conscientious right to relief; and the impossibility of obtaining adequate remedy at law. If the party, although clearly entitled to relief, can obtain adequate and certain remedy at law, then, in accordance with the fundamental principles of equitable jurisdiction, the concurrent jurisdiction does not exist, and the exclusive jurisdiction is not exercised.[1] This doctrine, it should be remembered, refers to the origin of the equity jurisdiction, and not to its subsequent and present condition. Its operation is controlled and modified by the other most important principle, fully discussed heretofore, that when the equitable jurisdiction, either concurrent or exclusive, has once been established with respect to any subject-matter, it is not destroyed or abridged by a jurisdiction subsequently acquired by the courts of law to give the same or other adequate relief under the same circumstances. The jurisdiction of equity originally existing and exercised on the occasion of accident, has not, therefore, been theoretically affected by the powers given to or assumed by the courts of law to confer complete remedy in many cases which formerly belonged to the cognizance of equity alone.[2]

[1] See vol. 1, §§ 216–222. As Sir Wm. Blackstone shows, courts of law could always give adequate relief in certain instances of accident, viz., in cases of "loss of deeds, mistakes in receipts and payments, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies" (3 Bl. Comm. 431); the equitable jurisdiction has never extended to such cases.

[2] See vol. 1, §§ 276–281, where this doctrine is fully considered; People v. Houghtaling, 7 Cal. 348, 351.

§ 825. **Limitations.**—While the jurisdiction occasioned by accident is clearly limited, and the instances in which it is and is not exercised are well defined, it is difficult to formulate any general criterion which shall consistently express the extent of the limitation, and account for all these instances. It must be conceded, I think, that the conclusions of the equity courts on this subject are somewhat arbitrary. In the very earliest period of equity jurisprudence, before doctrines had been fully developed and defined, the jurisdiction was undoubtedly understood as embracing every kind of case in which an unexpected result had been produced by accident—every kind of misfortune; and the rule is even laid down in this manner by Lord Coke.[1] It is now the firmly settled doctrine with respect to many legal obligations, that there is no equitable jurisdiction to relieve parties from their non-performance caused by accident in its ordinary and popular meaning. The following are the important instances in which the jurisdiction does not exist or will not be exercised.

§ 826. **Contracts.**—As a general rule where the obligation arises from an express contract created by the stipulations of the parties, and a non-performance is wholly the result of accident, or a party without fault has been accidentally prevented from completing the execution of the agreement, and deriving full benefits therefrom, in either case equity does not exercise its jurisdiction to give him any relief whether by way of defense against the enforcement of the obligation, or by way of affirmative remedy. The exception is confined to agreements providing for a penalty or a forfeiture, in which the jurisdiction to relieve is settled within defined and narrow limits.[2]

[1] 4 Inst. 84: "Accident, as when a servant of an obligor, mortgagor, etc., is sent to pay the money *on the day*, and he is robbed, remedy is to be had in this court against the forfeiture." This statement by Lord Coke is probably due, in great measure, to his ignorance of equity. A case in the "Introduction to the Calendars of Proceedings in Chancery" (vol. 1, p. cxlii.) illustrates the early view of the jurisdiction. A. B. had entered into a bond, with a heavy penalty, to repair certain river banks near the town of Stratford-at-Bow, within a specified time. He had been prevented from completing the contract within the required time by sudden and unexpected floods; and the obligee in the bond had sued him at law to recover the penalty. He thereupon filed a bill in chancery to restrain the action at law, and to be relieved from the consequences of the accident.

[2] This doctrine may be illustrated by a simple supposed case. If A. has contracted to build a house by a certain day named, and in the course of completing the agreement has collected a quantity of materials all prepared and necessary for the building, and all these materials are, without A.'s fault, by a mere accident—a stroke of lightning and consequent fire—destroyed, so that it becomes physically impossible to replace them and to finish the house within the specified time—there is no jurisdiction in equity to relieve A. in any manner from the liability caused by the non-perform-

§ 827.—**Supplying Lost Records.**—It has been held that there is no jurisdiction in equity to supply or establish the records of a court of law which have been lost or accidentally destroyed.[1] It seems, however, that a court of equity may, by a suit between the persons interested, confirm the title of a party, vest it in him by decree, and grant him all needed relief, when the records of a court ordering a judicial sale upon which that title depends, have been lost.[2]

§ 828. **Other Instances in which the Jurisdiction is not Exercised.**—The jurisdiction will not be exercised on behalf of a party when the accident is the result of his own culpable negligence or fault.[3] Nor will the jurisdiction ever be exercised on behalf of a person who has not a vested right, but whose only claim is a mere expectancy or hope resting upon the volition or discretion of another. As, for example, if a testator was prevented by pure accident from making an intended bequest in favor of A., equity has no jurisdiction to relieve A. from the disappointment.[4]

ance of his contract. Courts of equity as well as courts of law, say that parties must guard against the possible effect of such misfortunes by express stipulations inserted in their agreements. Among the illustrations of this doctrine, the most frequent are covenants by lessees to pay rent, to keep the buildings in repair, and the like; if the premises are consumed by accidental fire, or destroyed by other inevitable accident, the lessee is not relieved from the obligation of his covenant at law or in equity. Bullock v. Dommitt, 6 T. R. 650; Brecknock Can. Co. v. Pritchard, 6 Id. 750; Belfour v. Weston, 1 Id. 310; Pym v. Blackbourn, 3 Ves. 34, 38; Fowler v. Bott, 6 Mass. 63; Hallett v. Wylie, 3 Johns. 44; Wood v. Hubbell, 10 N. Y. 479; 5 Barb. 601. This does not at all interfere with the jurisdiction which *may* exist to relieve the lessee from a forfeiture of his estate by the non-performance of his covenant. See *ante*, vol. 1, §§ 453, 454. The same doctrine applies to other kinds of contracts, although both parties may be wholly and equally free from blame. Illustrations; agreements for the sale and purchase of land, where buildings thereon had been accidentally burned, Brewer v. Herbert, 30 Md. 301; McKecknie v. Sterling, 48 Barb. 330, 335; but see Smith v. McCluskey, 45 Barb. 610, 613; agreements the performance of which is prevented by the death of a person upon whose act the performance depended: Blundell v. Brettargh, 17 Ves. 232, 240; White v. Nutts, 1 P. Wms. 61; Mortimer v. Capper, 1 Bro. Ch. 156.

[1] Keen v. Jordan, 13 Flor. 327, 333–335; Clingman v. Hopkie, 78 Ill. 152 (records of a justice's court).

[2] Garrett v. Lynch, 45 Ala. 204.

[3] *Ex parte* Greenway, 6 Ves. 812; Penny v. Martin, 4 Johns. Ch. 566, 569; Marine Ins. Co. v. Hodgson, 7 Cranch, 336; Barnet v. Turnp. Co., 15 Vt. 757; for cases where the courts refuse to relieve from forfeitures caused by the negligence or fault of the party himself, see vol. 1, § 452. See, however, Chase v. Barrett, 4 Paige, 148, with respect to an agreement the fulfillment of which, according to the intention of the parties, is prevented by the act of God.

[4] Whitton v. Russell, 1 Atk. 448. For the same reason a court of equity can not relieve by supplying the total non-execution of an ordinary power, no matter how accidental. Tollet v. Tollet, 2 P. Wms. 489; Pierson v. Garnet, 2 Bro. Ch. 38, 226; Harding v. Glyn, 1 Atk. 469; Brown v. Higgs, 8 Ves. 561. If the power is accompanied with a trust, so that its execution is a matter of obligation, equity may relieve against its non-execution as in the case of any other obligatory trust.

§ 829. **Parties against Whom the Jurisdiction is not Exercised.**—There are also limitations with respect to the situation of the parties against whom the jurisdiction is invoked. It will not be exercised in behalf of any person against a *bona fide* purchaser for a valuable consideration and without notice.[1] And, generally, the jurisdiction will not be exercised against a party who has an equal equity, and is equally entitled to protection with the one who seeks to be relieved from the effects of an accident.[2]

§ 830. **Particular Instances of the Jurisdiction.**—I pass now to the affirmative side of the subject, and briefly describe those cases in which a jurisdiction occasioned by accident exists and is exercised. It will be found by examining and comparing these instances, that in all of them the party in whose behalf the jurisdiction is exercised, has an unmistakable right to relief, an equity intrinsically superior to that of his adversary, and unaffected by his own negligence or other fault, and that the relief to which he was entitled could not be adequately conferred by courts of law, at the time when the equitable jurisdiction was first established. The following are the important examples of this jurisdiction.

§ 831. **1. Suits on Lost Instruments.**—It has long been settled that courts of equity have jurisdiction of suits brought to recover the amount due on lost bonds and other sealed instruments. The original grounds of this jurisdiction were two. In the first place, by the common law pleading and procedure *profert* of the sealed instrument was necessary in an action at law thereon; and as no *profert* was possible when the writing was lost, the action could not be maintained. *Profert* was never necessary in a suit in equity. In the second place, the court of equity could require an indemnity from the plaintiff, and could by its decree adjust the rights of the two litigants, by securing and indemnifying the defendant against all further liability and harm, a power which was not possessed by the courts of law. In order to protect the defendant in this manner, the rule became settled that in all suits praying for relief, and not *merely* for a discovery—that is, in all suits where a recovery of the amount due was sought, the plaintiff must make an affidavit of the loss accompanying his bill of complaint, and must offer indemnity. The fact that the common law requisite of a *profert*

[1] See *ante*, § 776 and cases cited.

[2] Weal v. Lower, 1 Eq. Abr. 266; Powell v. Powell, Prec. Ch. 278; Jenkins v. Kemis, 1 Chan. Cas. 103; 1 Fonbl. Eq. B'k, 1 Ch. 4, § 25 and notes.

has long been abolished, and that actions at law may now be maintained on sealed instruments, has not theoretically affected the equitable jurisdiction.[1]

§ 832. **On Lost Unsealed Instruments.**—Where a negotiable bill, note, or check, whether payable to bearer, indorsed in blank, or not indorsed, is lost before maturity, it is held in England that no action at law can be maintained upon it by the real owner, and that his remedy is in equity.[2] According to these decisions, the only jurisdiction in such case was that in equity prior to the modern legislation which permitted actions in courts of law. Without inquiring whether this view of the jurisdiction at law be correct, the jurisdiction in equity of suits brought by the real owner to recover the amount due on lost negotiable instruments has been long and firmly settled upon the ground of the indemnity which can be given by a court of equity to the defendant, and which is a necessary feature of such suits. An offer of indemnity by the plaintiff is therefore required as the general rule; but even without it a recovery may be had, since the defendant can always be protected by the provisions of the decree making a recovery conditional upon his being fully indemnified.[3] Able judges have denied that the equitable jurisdiction extends to suits upon non-negotiable instruments and other unsealed contracts, since an action at law could always be maintained, and no indemnity was necessary.[4] The jurisdiction is sustained, however, by the decided weight of authority in suits upon lost non-negotiable instruments and simple contracts, as well as in suits upon negotiable and sealed instruments. The reason seems to be that the remedy at law is not adequate; a court of equity alone can fully protect the defendant by its decree from all liabilities which *may* arise.[5] It

[1] Walmsley v. Child, 1 Ves. Sen. 341, 344; Kemp v. Pryor, 7 Ves. 237, 249, 250; East India Co. v. Boddam, 9 Id. 464, 466–469; *Ex parte* Greenway, 6 Id. 812, 813; Toulmin v. Price, 5 Id. 235, 238 Atkinson v. Leonard, 3 Bro. Ch. 218, 224; England v. Tredegar, L. R., 1 Eq. 344; Patton v. Campbell, 70 Ill. 72; Howe v. Taylor, 6 Oreg. 284, 291; Allen v. Smith, 29 Ark. 74; Hickman v. Painter, 11 W. Va. 386; Force v. City of Elizabeth, 27 N. J. Eq (12 C. E. Green), 408; Donaldson v. Williams, 50 Mo. 407; Livingston v. Livingston, 4 Johns. Ch. 294; Thornton v. Stewart, 7 Leigh, 128; and see Hudspeth v. Thomason, 46 Ala. 470; Lawrence v. Lawrence, 42 N. H. 109.

[2] Hansard v. Robinson, 7 B. & C. 90; Crowe v. Clay, 9 Exch. 604; Ramuz v. Crowe, 1 Id. 167.

[3] Walmsley v. Child, 1 Ves. Sen. 341, 344, 345; Glynn v. B'k of Eng., 2 Id. 281; Bromley v. Holland, 7 Ves. 3, 19–21; Mossop v. Eadon, 16 Id. 430, 433, 434; Savannah Nat. B'k v. Haskins, 101 Mass. 370.

[4] See Mossop v. Eadon, 16 Ves. 430, 433, 434.

[5] Macartney v. Graham, 2 Sim. 285; Hardeman v. Battersby, 53 Ga. 36, 38 (suit on a lost warehouseman's receipt); Hickman v. Painter, 11 W. Va. 386; Allen v. Smith, 29 Ark. 74; Force v. City of Elizabeth, 27 N. J. Eq. (12 C. E. Green), 408.

has been held that the equitable jurisdiction does not extend to *destroyed* bills, notes, and other contracts, because the remedy at law was always adequate.[1] All these instances of suits upon lost contracts plainly belong to the *concurrent* jurisdiction of equity, because the plaintiff's primary right of contract which is the foundation of his course of action is purely legal, and his remedy is legal, being the ordinary judgment for the recovery of money.[2] Although this particular jurisdiction is theoretically unchanged, yet the cases under it are very few. Actions on lost negotiable instruments and other contracts, are ordinarily brought at law, in pursuance of modern permissive statutes. This is especially true in the states which have adopted the reformed procedure; since the action, even if not professing to be based upon the statute, would be subject to the rules which govern all legal actions for the recovery of money; it would not in any way be distinguished from actions confessedly legal.

§ 833. **2. Accidental Forfeitures.**—It was shown in a former chapter, that the jurisdiction to relieve from pecuniary penalties is well settled and general;[3] and that it also extends to some, though not to all, cases of forfeiture as distinguished from penalties. It is, however, well settled, as a branch of the jurisdiction occasioned by accident, that, although the agreement is not wholly pecuniary and is not one measured by pecuniary compensation, still if the party bound by it has been prevented

[1] Wright v. Lord Maidstone, 1 K. & J. 701, 708, *per* Page-Wood, V. C. It may be doubted whether the American courts have generally followed this distinction. See the American cases cited *ante* under this paragraph.

[2] Equity does not acquire jurisdiction *merely* because a deed of land has been lost, since in a legal action the deed and its contents could always be proved. To give rise to the equitable jurisdiction, on the occasion of a lost deed, it must appear that there is no remedy at all, or else no adequate remedy at law. Whitfield v. Fausset, 1 Ves. Sen. 387, 392. If the owner of land is in possession, and has lost his title-deed, there is no remedy at all at law, for ejectment clearly will not lie. Equity, then, has jurisdiction by a suit in the nature of an action to quiet title, and can establish the owner's title and possession. Dalston v. Coatsworth, 1 P. Wms. 731. The same kind of suit seems to be proper, and for the same reasons, when the records of the owner's title are lost. See Garrett v. Lynch, 45 Ala. 204. When the owner is out of possession, the action of ejectment will ordinarily furnish an adequate remedy. There may, however, be special circumstances, and other equities besides that arising from the loss of a title-deed, which furnish a sufficient ground for the cognizance of a court of equity in establishing the title and decreeing possession. Something more than a loss of deeds would be necessary. Dormer v. Fortescue, 3 Atk. 124, 132; Whitfield v. Fausset, 1 Ves. Sen. 387, 392.

[3] See vol. 1, §§ 432–460. It has sometimes been said by writers that this entire jurisdiction over penalties and forfeitures is based upon accident. It may be true that, in the earliest period of equity, the chancellors referred cases of relief against penalties to the general head of accident; but to explain the whole jurisdiction as now administered, by treating it as based on accident, is to disregard the plain facts and meaning of words.

from an exact fulfillment, so that a forfeiture is thereby incurred, by unavoidable accident without his own negligence or fault, a court of equity will interpose and relieve him from the forfeiture so caused, upon his making compensation, if necessary, or doing everything else within his power to satisfy the equitable rights of the other party.[1] This jurisdiction may be exercised in any manner, by any form of suit, and by granting any kind of relief, made necessary by the circumstances of the particular case. Thus the relief may be conferred by a suit to enjoin the prosecution of an action at law brought to enforce the forfeiture, or to enjoin proceedings on the judgment recovered in such an action, or to set aside the forfeiture itself, or to redeem from it, or to obtain several of these remedies in combination. In all those states which have adopted the reformed procedure, the jurisdiction may be exercised and the relief obtained, as it seems to me upon every sound principle of construction, by means of an equitable defense interposed in a legal action brought to enforce the forfeiture.[2]

§ 834. **3. Defective Execution of Powers.**—This subject has already been treated of, and the grounds, extent, and limitations of the peculiar doctrine have been explained.[3] It is unnecessary to repeat the observations there made. It is well settled, as a general rule, that the non-execution—the entire failure to execute—of a mere power not a trust, will not be

[1] See vol. 1, § 451; Hill v. Barclay, 18 Ves. 56, 58, 62, *per* Lord Eldon; Eaton v. Lyon, 3 Ves. 690, 693, *per* Lord Alvanley; Hannam v. South Lond. W. Co., 2 Meriv. 61; Bamford v. Creasy, 3 Giff. 675; Wing v. Harvey, 5 De G. M. & G. 265; Duke of Beaufort v. Neeld, 12 Cl. & Fin. 248; Bridges v. Longman, 24 Beav. 27; Meek v. Carter, 6 W. R. 852; Wheeler v. Conn. Mut. L. Ins. Co., 82 N. Y. 543, 549; Giles v. Austin, 62 Id. 486; Witbeck v. Van Rensselaer, 64 Id. 27; 2 Hun, 55; 4 T. & C. 282; Palmer v. Ford, 70 Ill. 369; Orr v. Zimmerman, 63 Mo. 72; Eveleth v. Little, 16 Me. 374, 377; Atkins v. Rison, 25 Ark. 138; Bostwick v. Stiles, 35 Conn. 195. In Whelan v. Reilly, 61 Mo. 565, a deed of trust, given in place of a mortgage to secure a debt, provided that if the interest was not punctually paid as it became due, the whole principal should be due and payable, and the trustee might sell. The debtor made default in paying a portion of the interest when it fell due, and the trustee thereupon took the proper steps to sell, and did sell in the regular manner. Before the sale, the debtor tendered the amount of interest due and costs, which the trustee refused to accept, but went on with the sale: *Held*, upon these facts, that the debtor could maintain a suit in equity to be relieved from the forfeiture, and to set aside the sale. This decision should be considered in connection with the discussion in § 439 (vol. 1), and the cases there cited. It seems to be opposed to the general tendency of those cases.

[2] See Giles v. Austin, 62 N. Y. 486, and other American cases cited in the last note; also see Miesell v. Globe Ins. Co., 76 N. Y. 115, 120; Shaw v. Republic Ins. Co., 69 Id. 286, which hold that when a life policy becomes accidentally forfeited, the holder need not at once bring an equity suit for the purpose of re-establishing it; but may tender the premiums as they fall due, and then sue on it at law when the person whose life is assured dies.

[3] See *ante*, §§ 589, 590.

aided in equity.[1] When, however, the party clothed with such a mere power by a deed, settlement, or will, has attempted and begun to execute it, and the execution is defective through accident or mistake, or where he has made an agreement to execute it which is regarded as a kind of defective execution, equity may interpose its aid by decreeing a complete and perfect execution.[2] As has already been explained, this extraordinary jurisdiction is only exercised on behalf of classes of persons who are considered as possessing a certain meritorious or moral consideration, and against a party who has no equally meritorious equity. Its operation is confined to purchasers, including mortgagees, lessees, and creditors, wives, legitimate children and those to whom the party executing stands *in loco parentis*, and charities; it does not include husbands, illegitimate children, distant relatives, nor volunteers.[3] As to the defects in the execution of a power which equity will thus aid and complete in proper cases, they must be in matters of form, and not of the very substance and essence of the power—such as the want of a seal, or of witnesses, or of signatures, or omissions and imperfections in the limitations of the property.[4]

[1] Tollet v. Tollet, 2 P. Wms. 489; 1 Eq. Lead. Cas. 365, and notes (4th Am. ed.); Arundell v. Phillpot, 2 Vern. 69; Bull v. Vardy, 1 Ves. 270; Johnson v. Cushing, 15 N. H. 298; Lippencott v. Stokes, 2 Halst. Ch. 122; Howard v. Carpenter, 11 Md. 259; Lines v. Darden, 5 Flor. 51; Mitchell v. Denson, 29 Ala. 327; Wilkinson v. Getty, 13 Iowa, 157.

[2] Tollet v. Tollet, *supra;* Chapman v. Gibson, 3 Bro. Ch. 229; Shannon v. Bradstreet, 1 Sch. & Lef. 52, 63; Sayer v. Sayer, 7 Hare, 377; and see *ante*, §§ 589, 590.

[3] See *ante*, § 589; Tollet v. Tollet, 1 Eq. Lead. Cas. 365 and notes; Fothergill v. Fothergill, Freem. Ch. 256; Barker v. Hill, 2 Ch. Rep. 113; Reid v. Shergold, 10 Ves. 370; Pollard v. Greenvil, 1 Chan. Cas. 10; Wilkes v. Holmes, 9 Mod. 485; Clifford v. Burlington, 2 Vern. 379; Sneed v. Sneed, Ambl. 64; Bruce v. Bruce, L. R., 11 Eq. 371; Hervey v. Hervey, 1 Atk. 561; Innes v. Sayer, 7 Hare, 377; 3 Macn. & G. 606; Att'y-Gen. v. Sibthorp, 2 Russ. & My. 107; Ellison v. Ellison, 6 Ves. 656; Watt v. Watt, 3 Id. 244; Tudor v. Anson, 2 Ves. Sen. 582; Watts v. Bullas, 1 P. Wms. 60; Affleck v. Affleck, 3 Sm. & Giff. 394; *In re* Dyke's Estate, L. R., 7 Eq. 337; Dowell v. Dew, 1 Y. & C. 345; Hughes v. Wells, 9 Hare, 749; Shannon v. Bradstreet, 1 Sch. & Lef. 52; Taylor v. Wheeler, 2 Vern. 564; Campbell v. Leach, Ambl. 740; Bixbey v. Eley, 2 Bro. Ch. 325; Medwin v. Sandham, 3 Sw. 685; Proby v. Landor, 28 Beav. 504; Beatty v. Clark, 20 Cal. 11; Love v. Sierra etc. Co., 32 Id. 639, 653; Thorp v. McCullum, 1 Gilman, 614; Hout v. Hout, 20 Ohio St. 119; Schenck v. Ellingwood, 3 Edw. Ch. 175; Pepper's Will, 1 Pars. Eq. 436, 446; Porter v. Turner, 3 Serg. & R. 108, 114; Dennison v. Goehring, 7 Barr. 175; Huss v. Morris, 63 Pa. St. 367.

[4] Tollet v. Tollet, 1 Eq. Lead. Cas. 365 and notes. Where a power was required to be executed by means of a deed or other instrument *inter vivos*, an execution of it by a will is a defect which equity will aid, Tollet v. Tollet, *supra;* but, conversely, when it was required to be executed only by a will, an execution by an absolute deed will not be aided. Reid v. Shergold, 10 Ves. 370; Adney v. Field, Ambl. 654. The defects which equity may aid consist either of the use of an inappropriate instrument, although it is duly executed, as in Tollet v. Tollet; *In re* Dyke's Estate, L. R., 7 Eq. 337; Garth v. Townsend, Id. 220; or in the improper and insufficient

The doctrine is confined to powers created by the voluntary act of persons in wills, deeds, and settlements; it does not extend to those created and regulated by statute. The defective execution of statutory powers, in the failure to comply with the prescribed requisites, can not be aided by equity.[1]

§ 835. **Powers in Trust will be Enforced.**—The general rule that equity refuses to aid the non-execution of powers, and only corrects their defective execution, relates only to bare, naked, or mere powers; it does not apply to powers coupled with a trust. Mere powers create no obligation resting on the donee, nor any right in a person who may be benefited by their execution. Powers in trust, or coupled with a trust, like any other trust, are imperative; they create a duty in the trustee, and a right in the beneficiary. Equity will not suffer this right of the beneficiary to be defeated either by accident or by designs of the trustee, and will therefore carry into effect the intention of the donor, and give all needed relief to the beneficiary, whenever there has been a total or a partial failure to execute the power according to the terms of the trust.[2]

§ 836. **4. Judgments at Law.**—Accident is also one of the grounds for the exercise of the most important jurisdiction with respect to actions and judgments at law. Where the defendant in an action at law has a good defense on the merits, which he is prevented by accident from setting up or making available, without any negligence or inattention on his part, and a judgment is recovered against him, equity will exercise its jurisdiction on his behalf by enjoining further proceedings to enforce the judgment, or by setting it aside so that a new

mode of executing an appropriate kind of instrument, as, for example, omitting a seal. Morse v. Martin, 34 Beav. 500; see Piatt v. McCullough, 1 McLean, 69, where relief was refused on the ground that the defect was inherent and not merely formal. In order to admit the exercise of the jurisdiction and to grant relief, there must be something more than a mere verbal promise to execute the power; there must always be some writing attempting, or showing an intention to execute. Carter v. Carter, Moseley, 365; Shannon v. Bradstreet, 1 Sch. & Lef. 52; Innes v. Sayer, 7 Hare, 377; Dowell v. Dew, 1 Y. & C. 345; Vernon v. Vernon, Ambl. 3; Campbell v. Leach, Ambl. 740; Wilson v. Piggott, 2 Ves. 351; Mitchell v. Denson, 29 Ala. 327; Barr v. Hatch, 3 Ohio, 527. See, also, on the general doctrine, Bradish v. Gibbs, 3 Johns. Ch. 523, 550; Long v. Hewitt, 44 Iowa, 363; Porter v. Turner, 3 Serg. & R. 108, 111, 114; Bakewell v. Ogden, 2 Bush. 265; Stewart v. Stokes, 33 Ala. 494; Kearney v. Vaughan, 50 Mo. 284.

[1] Smith v. Bowes, 38 Md. 463; Earl of Darlington v. Pulteney, Cowp. 260; and see Stewart v. Stokes, 33 Ala. 494; Gridley's Heirs v. Phillips, 5 Kans. 349; Kearney v. Vaughan, 50 Mo. 284.

[2] Warneford v. Thompson, 3 Ves. 513; Brown v. Higgs, 8 Id. 561, 574; Gibbs v. Marsh, 2 Met. 243, 251; Withers v. Yeadon, 1 Rich. Eq. 324, 329; Norcum v. D'Œnch, 17 Mo. 98; Thorp v. McCullum, 1 Gilman, 614, 625, 650.

trial can be had on the merits.[1] In many states, especially in those which have adopted the reformed procedure, this particular relief is usually obtained by means of a motion for a new trial, and the necessary occasions for a resort to equity have been lessened; the equitable jurisdiction, however, has not been abrogated even in those states, and it is constantly invoked in the other commonwealths.

§ 837. 5. **Other Special Instances.**—There are other specific instances of the jurisdiction which must be referred to accident as their occasion. It will be sufficient to mention them in the briefest manner, and it will be seen that they all fall under the general principle stated in the introductory paragraphs of this section. An executor or administrator will be relieved in equity from many liabilities arising from unforeseen and unexpected circumstances in the nature of accidents, where he has acted in good faith and reasonable care, although no remedy was given by the common law. Thus, where an executor or administrator has paid debts or legacies in full supposing the assets were sufficient, and it turns out that there is a deficiency of assets, equity will grant the remedies necessary to relieve him from the legal liability.[2] In another class of cases, where the consideration contracted to be rendered in return for the payment of a large sum of money entirely fails from accident, and where the dispositions of the principal or income of public securities directed by will to be made among successive beneficiaries become impossible from accident, equity has in-

[1] Cairo etc. R. R. v. Titus, 27 N. J. Eq. (12 C. E. Green), 102; Darling v. Baltimore, 51 Md. 1; Alford v. Moore, 15 W. Va. 597; Barber v. Rukeyser, 39 Wisc. 590; Thomason v. Fannin, 54 Ga. 361; Grubb v. Kolb, 55 Id. 630; Robinson v. Wheeler, 51 N. H. 384; Craft v. Thompson, 51 Id. 536; Holland v. Trotter, 22 Gratt. 136; N. Y. etc. R. R. v. Haws, 56 N. Y. 175; Richmond Enquirer v. Robinson, 24 Gratt. 548; Shields v. McClung, 6 W. Va. 79. See Earl of Oxford's Case, 1 Ch. Rep. 1; 2 Eq. Lead. Cas. 1291 and notes (4th Am. ed.)

[2] Edwards v. Freeman, 2 P. Wms. 435, 447; Hawkins v. Day, Ambl. 160. See also as further illustrations, Jones v. Lewis, 2 Ves. Sen. 240; Clough v. Bond, 3 My. & Cr. 490; Pooley v. Ray, 1 P. Wms. 355. As to the relief given by equity to an unpaid legatee against other legatees who have been paid in full, when there was an original deficiency of assets, see Orr v. Kaines, 2 Ves. Sen. 194; Moore v. Moore, Id. 596, 600; Noel v. Robinson, 1 Vern. 90, 94; Edwards v. Freeman, 2 P. Wms. 435, 447; Walcot v. Hall, 2 Bro. Ch. 305. The specific instances mentioned in the text and note have certainly become obsolete or been abrogated in very many of the states. The whole subject of administration has, to a great extent, been regulated by statute and committed to the control of probate courts. These statutes differ in their details, but most, if not all of them define the rights and liabilities of administrators, executors, legatees, and creditors, and prescribe modes of proceeding, under the circumstances above mentioned in the text, viz., where some legatees or creditors have been paid in full, or more than their just proportion, and there turns out to be a deficiency of assets.

terposed for the purpose of working substantial justice.[1] Again, if a party to a suit in equity is obliged to make a tender, and through accident or mistake he tenders less than the required amount, the relief to which he is entitled will still be conferred; the decree will be so shaped as to be conditional upon his paying the proper sum.[2] Other instances which are partly referable to accident are mentioned in the foot-note.[3]

SECTION II.

MISTAKE.

ANALYSIS.

§ 838. Origin and purpose of this jurisdiction.
§ 839. I. Definition.
§§ 840–856. II. Various kinds of mistakes which furnish an occasion for relief.
§§ 841–851. *First.* Mistakes of law.
§ 842. The general rule and its limitations.
§ 843. Mistake as to the legal import or effect of a transaction.
§§ 844–851. Particular instances in which relief will or will not be granted.
§ 845. Reformation of an instrument on account of a mistake of law.
§ 846. Mistake common to all the parties: mistake of a plain rule.
§ 847. Mistake of law accompanied with inequitable conduct of the other party.
§ 848. Same: between parties in relations of trust.

[1] As an illustration of the first case: If a minor is bound as an apprentice and pays or agrees to pay a large premium, and the master becomes bankrupt before the apprenticeship has expired, equity will relieve the disappointed apprentice by apportioning the premium. Hale v. Webb, 2 Bro. Ch. 78. As illustrations of the second case: If an annuity is directed by a will to be secured by an investment in public stock, and an investment is made sufficient at the time for the income to produce the amount of the annuity, and afterwards the stock is reduced by statute so that its income becomes insufficient, equity will relieve the annuitant by directing the deficiency to be made up by the residuary legatees. Davies v. Wattier, 1 S. & S. 463; May v. Bennett, 1 Russ. 370; for another illustration see Hachett v. Pattle, 6 Madd. 4.

[2] Clark v. Drake, 63 Me. 354.

[3] The well-settled jurisdiction for the adjustment of disputed boundaries between adjoining proprietors, rests partly upon the occasion of accident. Wake v. Conyers, 1 Eden, 331; 2 Cox, 360; Miller v. Warmington, 1 J. & W. 484; Perry v. Pratt, 31 Conn. 433; De Veney v. Gallagher, 20 N. J. Eq. (5 C. E. Green), 33; Norris' Appeal, 64 Pa. St. 275; Tillmes v. Marsh, 67 Id. 507; Wetherbee v. Dunn, 36 Cal. 249. This subject is discussed in a subsequent chapter. Where a note or bill of exchange is transferred and intended to be indorsed, but through accident or mistake the indorsement is omitted, equity will compel the transferror, or, in case of his death, his executor or administrator, to affix his indorsement, at the suit of the holder. This is, in fact, a simple case of reformation and re-execution. The holder is an equitable assignee, and is entitled to obtain a full legal right and title. Watkins v. Maule, 2 J. & W. 237, 242.

§ 849. Relief where a party is mistaken as to his own existing legal rights, interests, or relations.
§ 850. Compromises and voluntary settlements made upon a mistake as to legal rights.
§ 851. Payments of money under a mistake of law.
§§ 852–856. *Second.* Mistakes of fact.
§ 853. How mistakes of fact may occur.
§ 854. In what mistakes of fact may consist.
§ 855. Compromises and speculative contracts.
§ 856. Requisites to relief: mistake must be material and free from culpable negligence.
§§ 857–867. III. How mistake may be shown: when by parol evidence.
§ 858. Parol evidence in general in cases of mistake, fraud, or surprise.
§ 859. In suits for a reformation or cancellation: character and effect of the evidence.
§ 860. Parol evidence in defense in suits for a specific performance.
§ 861. Parol evidence of mistake on the plaintiff's part in suits for a specific performance: English rule.
§ 862. Same: American rule: evidence admissible.
§ 863. Evidence of a parol variation which has been part-performed.
§§ 864–867. Effect of the statute of frauds upon the use of parol evidence in equitable suits.
§ 865. Two classes of cases in which the use of parol evidence may be affected by the statute.
§ 866. General doctrine: parol evidence of mistake or fraud admissible in both these classes of cases.
§ 867. Glass v. Hulbert: examination of proposed limitations upon this general doctrine.
§§ 868–871. IV. Instances of equitable jurisdiction occasioned by mistake.
§ 868. When exercised by way of defense.
§ 869. By way of affirmative relief: recovery of money paid by mistake.
§ 870. Affirmative relief: reformation and cancellation.
§ 871. Conditions of fact which are occasions for affirmative relief.

§ 838. **Origin and Purpose of this Jurisdiction.**—From the time when jurisdiction was first formally delegated to the chancellor by the crown, mistake has played a most important part as the occasion of equitable rights and duties, and for the exercise of the jurisdiction in awarding equitable remedies. In the earlier periods, when the domains of the law courts and of the court of chancery were sharply discriminated, when the common law judges were not influenced by equitable notions, this branch of equitable jurisprudence and jurisdiction consisted entirely in the means by which certain parties were prevented from holding and enjoying legal rights, and certain other parties were relieved from the burden of legal duties and liabilities, which had originated under a mistake, and which were complete

and unassailable at law. In the progress of time, as the common law became more and more conformed to equitable principles, the legal tribunals assumed a partial cognizance and gave a partial relief in cases involving mistake. All the *possible* modes in which the remedial jurisdiction occasioned by mistake can be exercised, are the following: (1) Negatively, as a ground of defense either in actions at law or in suits in equity, to defeat an enforcement of and recovery upon either legal or equitable rights of action; (2) Affirmatively, as a ground for rescinding a transaction, and restoring the mistaken party to his original position by means of an appropriate legal action and a recovery therein of money or property; (3) Affirmatively, as a ground for the equitable relief of rescinding a transaction, or canceling an agreement or other written instrument; (4) Affirmatively, as a ground for the equitable relief of reforming or re-executing a written instrument. The final object of the present discussion is to ascertain when these various remedies may be obtained in equity; and incidentally to ascertain when and to what extent some of them may be conferred by courts of law. The discussion itself will be conducted under the following divisions: (1) Definition; (2) A statement of the various kinds of mistakes both of law and of fact which do or do not furnish an occasion for relief, with an examination of the equitable conception and the essential elements of a mistake in order that it may be a ground for the exercise of jurisdiction; (3) The mode of showing a mistake, and especially, How far may parol evidence be resorted to for the purpose of showing mistakes in written instruments; (4) An enumeration of the instances and forms of equitable jurisdiction and reliefs occasioned by mistake.

§ 839. **I. Definition.**—It is very difficult to formulate a definition which shall contain the essential elements of the conception as distinguished from its effects, and which shall accurately discriminate between mistake and accident on the one side, and fraud and negligence on the other. The definitions given by some American and English text-writers describe the effects of mistake, the consequences resulting from it, rather than its essential features.[1] It was shown in the preceding section that

[1] Thus Judge Story says, mistake "is some unintentional *act*, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence." (Eq. Jur., § 110.) His language is copied by Snell (Principles of Eq., p. 370), and by Kerr (Fraud and Mist., p. 396). This definition is erroneous, as it seems to me, in two most important particulars. *First*, it substitutes the consequences of the thing in place of the thing itself, the act or omission done through mistake. *Secondly*, the language is so broad that it

accident is an unexpected occurrence *external* to the party affected by it; and its operation is ordinarily to prevent that party from doing some act, whereby he becomes subjected to a liability which would not otherwise have arisen. Mistake, on the other hand, is *internal;* it is a mental condition, a conception, a conviction of the understanding, erroneous, indeed, but none the less a conviction, which influences the will, and leads to some outward physical manifestation. Its operation is ordinarily, though not always, affirmative, the doing of some act which would not have been done in the absence of the particular conception or conviction which influenced the free action of the will.[1] Its essential prerequisite is *ignorance.* It is distinguished from fraud, fraudulent representations, or fraudulent concealments, by the absence of knowledge and intention, which in legal fraud are actually present, and in constructive fraud are theoretically present, as necessary elements. It is also distinguished from that inattention or absence of thought which are inherent in negligence. The erroneous conception or conviction of the understanding which constitutes the equitable notion of mistake, has nothing in common with negligence; equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence.[2] Mistake, therefore, within the meaning of equity, and

not only embraces in its very terms, acts and omissions which are the results of fraud, but it fails to exclude those which are occasioned through negligence. The modern commentators upon the Roman law, who have generally investigated the nature of legal relations much more accurately and profoundly than the common law writers, do not fall into this error. They correctly describe mistake as essentially a mental or intellectual condition interfering with the free operation of the will, and not as the acts or omissions produced by that condition. Mr. Haynes, in his lectures on equity, gives a definition which much more nearly embodies the true conception. He says (p. 80): "Mistake may be said to exist in a legal sense, where a person acting upon some erroneous conviction, either of law or of fact, executes some instrument, or does some act which, but for that erroneous conviction, he would not have executed or done." He here correctly apprehends that the mental condition—the "erroneous conviction"—constitutes the mistake, and not the act done in pursuance of it.

[1] This analysis is not a mere matter of words. Upon the accurate notion of what is essential to the legal conception of mistake, depends the answer to the question, when may a person be relieved from the consequences of his mistakes of law?

[2] Leuty v. Hillas, 2 De G. & J. 110, 121; Duke of Beaufort v. Neeld, 12 Cl. & Fin. 248, 286; Wild v. Hillas, 28 L. J. Ch. 170; Gregory v. Wilson, 9 Hare, 683, 689; Drewry v. Barnes, 3 Russ. 94; Bateman v. Willoe, 1 Sch. & Lef. 201; Ware v. Harwood, 14 Ves. 28, 31; Stevens v. Praed, 2 Id. 519; Stephenson v. Wilson, 2 Vern. 325; Trigge v. Lavallée, 15 Moore P. C. 270; Marquis of Breadalbane v. Marquis of Chandos, 2 My. & Cr. 711, 719; Henderson v. Cook, 4 Drew. 306; Diman v. Providence etc. R. R., 5 R. I. 130; Western R. R. v. Babcock, 6 Met. 346; Wood v. Patterson, 4 Md. Ch. 335; Kite v. Lumpkin, 40 Ga. 506; Lamb v. Harris, 8 Id. 546; Capehart v. Mhoon, 5 Jones Eq. 178.

as the occasion of jurisdiction, is an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time. I add the two following definitions, which originally appeared in the proposed civil code of New York, and were thence adopted by the existing civil code of California, because they embody the essential notions which I have attempted to explain, and are both accurate and comprehensive. "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed."[1] "Mistake of law constitutes a mistake, only when it arises from: 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or 2. A misapprehension of the law by one party, of which the others are aware at the time of con-

[1] Civil Code of N. Y. (proposed), § 762; Civil Code of Cal. § 1577. The authors of the New York code cite the following authorities in support of the material items of their definition. Introductory part: *Absence of neglect*, U. S. B'k v. B'k of Ga., 10 Wheat. 333. Subd. 1. *Unconscious*, Kelly v. Solari, 9 M. & W. 54; McDaniels v. B'k of Rutland, 29 Vt. 230, 238; Elwell v. Chamberlain, 4 Bosw. 320; *Ignorance*, Bell v. Gardiner, 4 M. & G. 11; 4 Scott, N. R. 621; Hore v. Becher, 12 Sim. 465; East Ind. Co. v. Donald, 9 Ves. 275; East I. Co. v. Neave, 5 Id. 173; Cocking v. Pratt, 1 Ves. Sen. 400; Briggs v. Vanderbilt, 19 Barb. 222; *Forgetfulness*, Kelly v. Solari, 9 M. & W. 54; Lucas v. Worswick, 1 Moo. & Rob. 293; *Fact past*, McCarthy v. Decaix, 2 Russ. & M. 614; Willan v. Willan, 16 Ves. 72; East I. Co. v. Donald, 9 Id. 275; East I. Co. v. Neave, 5 Id. 173; Durkin v. Cranston, 7 Johns. 442; *Fact present*, Broughton v. Hutt, 3 De G. & J. 501; Colyer v. Clay, 7 Beav. 188; Hore v. Becher, 12 Sim. 465; Cocking v. Pratt, 1 Ves. Sen. 400; Huthmacher v. Harris' Adm'r, 38 Pa. St. 491. Subd. 2. *Thing which does not exist*, Hitchcock v. Giddings, 4 Price, 135; Hastie v. Couturier, 9 Exch. 102; 5 H. L. Cas. 673; Strickland v. Turner, 7 Exch. 208; Cochrane v. Willis, L. R., 1 Ch. 58; Rheel v. Hicks, 25 N. Y. 289; Ketchum v. B'k of Commerce, 19 Id. 499, 502; Belknap v. Sealey, 14 Id. 143; Martin v. McCormick, 8 Id. 331, 335; Kip v. Monroe, 29 Barb. 579; Briggs v. Vanderbilt, 19 Id. 222, 239; Gardner v. Mayor etc., 26 Id. 423; Wheadon v. Olds, 20 Wend. 174; Mowatt v. Wright, 1 Id. 355, 360; Allen v. Mayor etc., 4 E. D. Smith, 404; *Thing which has not existed*, Martin v. McCormick, 8 N. Y. 331, 335. The same authors add: "The *dicta* found in some cases to the effect that a mistake in respect of matters as to which the party had 'means of knowledge' does not avoid a contract (see Mut. L. Ins. Co. v. Wager, 27 Barb. 354; Clarke v. Dutcher, 9 Cow. 674; Milnes v. Duncan, 6 B. & C. 671), are not sustained by the decisions (see Allen v. Mayor, 4 E. D. Smith, 404; Kelly v. Solari, 9 M. & W. 54), and have been finally overruled (Townsend v. Crowdy, 8 C. B., N. S., 477; Bell v. Gardiner, 4 M. & G. 11; Dails v. Lloyd, 12 Q. B. 531)."

tracting, but which they do not rectify."[1] "Mistake of foreign law is a mistake of fact."[2]

§ 840. **II. Various Kinds of Mistakes which Furnish an Occasion for Relief.**—Under this most important head I purpose to examine more in detail the equitable conception of mistake; to ascertain its essential elements in order that it may be the ground of any equitable interposition; and to describe the various kinds of mistakes both of law and of fact which do or do not furnish an occasion for relief. We are met at the outset by a natural line of division. A party may enter into a transaction altering his legal relations for the better or the worse, with full knowledge of all the facts connected therewith, but ignorant or mistaken concerning either the general law of the land governing the case, or concerning his own personal legal rights affected by or resulting from the transaction. On the other hand, he may be cognizant of the general law and of his own legal rights, but be ignorant or mistaken as to some material fact of the transaction which forms an important factor in determining his action. All possible mistakes are therefore separated into those of law, and those of fact, although it is sometimes very difficult to ascertain in a particular instance whether the mistake is purely one of law, or is of law and of fact in combination. As the cases in which persons are relieved from their mistakes of law are somewhat exceptional, it will be convenient to examine them first in order.

§ 841. **First. Mistakes of Law.**—It is very important to form an accurate notion of the various conditions included within this general term; much confusion and apparent conflict of opinion have resulted from a failure to recognize these distinctions. Mistake of law may be an ignorance or error with respect to some general rules of the municipal law applicable to

[1] Civ. Code of N. Y., § 763; ditto of Cal., § 1578. The authors of the New York code cite in support of this definition. *Subd.* 1. Many v. Beekman Iron Co., 9 Paige, 188; Hall v. Reed, 2 Barb. Ch. 500; Pitcher v. Turin Pl. R. Co., 10 Barb. 436; Wake v. Harrop, 6 H. & N. 768. *Subd.* 2. Cooke v. Nathan, 16 Barb. 342. On the general subject of relief in equity from mistakes of law, they refer, in addition to Stone v. Godfrey, 5 De G. M. & G. 76, 90; Broughton v. Hutt, 3 De G. & J. 501; Evants v. Strode, 11 Ohio, 480; Wheeler v. Smith, 9 How. (U. S.) 55; Champlin v. Laytin, 18 Wend. 407, 422.

[2] Civil Code of N. Y., § 764; ditto of Cal., § 1579; citing McCormick v. Garnett, 5 De G. M. & G. 278; Leslie v. Baillie, 2 Y. & C. Ch. 91; Patterson v. Bloomer, 35 Conn. 57; Haven v. Foster, 9 Pick. 112; B'k of Chillicothe v. Dodge, 8 Barb. 233; Merch. B'k v. Spalding, 12 Id. 302. It should be added that the three definitions given in the text occur in the chapter of the codes which treats of the consent necessary to the completion of a contract, so that they primarily relate to mistakes in contracts; they may be readily applied, however, to mistakes in any other transaction.

all persons, which regulate human conduct, determine rights of property, of contract, and the like; such as the rules making certain acts criminal, and those controlling the devolution, acquisition, and transfer of estates, and those prescribing the modes of entering into agreements. On the other hand, the term may mean the ignorance or error of a particular person with respect to his own legal rights and interests which are affected by, or which result from, a certain transaction in which he engages. This application of the term may present two entirely different conditions. The person about to enter into the transaction may be ignorant of or mistaken about his own antecedent existing legal rights and interests which are to be affected by what he does, although he correctly apprehends and fully understands the legal import of the transaction itself and its true effects upon his supposed legal rights.[1] Or, the person may be correctly informed as to his existing legal rights, interests, or relations, and may be ignorant or mistaken with respect to the legal import of the transaction in which he engages, and its legal effect upon those rights, interests, or relations. Finally, in any one of the foregoing instances the ignorance or error may be confined to one party, or it may extend to both parties; all the parties may alike enter into the transaction under a common ignorance or error concerning the general rules of the law, or concerning the individual legal interests affected by or resulting from it. An ancient and familiar maxim of the common law is, *ignorantia juris non excusat.* This maxim confessedly has its primary application to cases of the first class above described, ignorance or error concerning the general rules of law controlling human conduct, and especially in criminal prosecutions.[2] The real question for discussion is, how far does it apply to the two species contained in the second class—mistakes as to individual legal rights. The principle embodied in the maxim was derived from the Roman law; little aid, how-

[1] For example, a person about to give a release, might erroneously suppose that he held only a life estate, while in fact he was the owner in fee; and might know that the legal operation of the conveyance was to release all the interest which he had. Compromises are the most common illustration of this species, when the parties correctly understand the legal effect of the agreement itself which they make, and of the instruments which they execute, and the mistake consists of their ignorance or error as to the nature of the prior legal rights which they possessed, and which they surrender by means of the compromise. It will be found, I think, that a great majority of the cases in which mistakes of law have been relieved, belong to this species.

[2] See 1 Plowden, 342, *per* Manwood, J.: "It is to be presumed that no subject of this realm is miscognizant of the law whereby he is governed. Ignorance of the law excuseth none."

ever, can be derived from the uncertain and conflicting opinions of the Roman law jurists and commentators.[1]

§ 842. **The General Rule, and its Limitations.**—The doctrine is settled that, in general, a mistake of law, pure and simple, is not adequate ground for relief. Where a party with knowledge of all the material facts, and without any other spe-

[1] In the digest, title "*De juris et facti ignorantia*," the general rule is stated: "*Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.*" (Dig. xxii, tit. vi, l. 9.) The following illustration is given: "If a man be ignorant of the death of a kinsman whose estate is to be administered, time shall not run against him and bar his claim to inherit; otherwise, if he be aware of the death and of his own relationship, but ignorant of his own right to inherit, time will bar his claim, because the error is one of law." The digest admitted certain classes of persons to whom relief would be allowed from the consequences of ignorance or error of law, "*quibus permissum est jus ignorare*"—namely, women, soldiers, and persons under the age of twenty-five. It was presumed that they had not had opportunities to become acquainted with the law. This permission was not universal; they were not allowed to allege their ignorance as defense for acts in violation of rules based upon the *jus gentium*, since these rules were founded upon natural reason and equity, and were apprehended *naturali ratione*, and did not require any special knowledge or study. (Dig., *ubi supra.*) The question, how far relief may be given for a mistake of law, has given rise to a great conflict of opinion among the modern commentators upon the Roman law. It was a settled doctrine that where one, through error, had paid what was not due, he might recover it back by an action called "*condictio indebiti.*" The importance of this action is shown by the fact that a whole title is devoted to it in the digest and also in the code. A text of the code seems to deny restitution where the money has been paid under an error of law: "*Quum quis jus ignorans indebitam pecuniam solverit, cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est.*" (Code, lib. I., tit. 18, l. 10.) Upon this text and some others, certain jurists, including Cujas, Donellus, Voet, and Pothier, maintain that no action ever lies to recover back money paid by mistake of law. Another class of writers equally eminent, among whom are Vinnius, Ulric Huber, Mühlenbruch, and D'Aguesseau, hold that the action can be maintained in all cases of error, whether of fact or of law. They contend that the action is eminently equitable, and can be defeated only by a defense which is equally equitable; that in the whole title on *condictio indebiti* in the digest, there is no text confining the action to error of fact, but the language everywhere speaks of "error" generally; and that the passages in the code, which seem to confine the remedy to errors of fact, are not general rules, but are all taken from imperial "rescripts" applicable only to special cases in which a natural, though not a legal, obligation to make the payment existed, so as to afford an equitable ground for retaining the money. This reasoning is certainly very powerful. A similar opinion, based entirely upon a comparison of texts in the digest and code, is maintained by a recent French writer, Prof. Demangeat, in his "Cours Élémentaire du Droit Romain" (vol. 2, pp. 370–372). Savigny in his great work on the Roman law, reaches the conclusion that money paid by a mistake of law can not be recovered back, unless it can be proved that the ignorance was excusable under the circumstances, and not the result of gross negligence ("Traité de Droit Romain," vol. 3, Append. 8, § 35, p. 415). The modern European codes based upon the Roman law, exhibit the same diversity. The French and the Austrian codes permit a recovery of money paid under a mistake either of law or of fact; the Prussian code permits it only when paid through a mistake of fact. See "Studies in Roman Law," by Lord Mackenzie, pp. 338–340; Austin, Lectures on Jurisprudence, vol. 2, pp. 168–170. The foregoing *résumé* shows that the question is one of great and inherent difficulty.

cial circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under an ignorance or error with respect to the rules of law controlling the case, courts will not in general relieve him from the consequences of his mistake.[1] The reasons are obvious. The administration of justice, the law itself as a practical system for the regulation of human conduct, require that some fundamental assumptions should be made as postulates. The most important, perhaps, of all these, is the assumption that all persons of sound and mature mind are presumed to know the law. If ignorance of the law were generally allowed to be pleaded, there could be no security in legal rights, no certainty in judicial investigations, no finality in litigations. While this general doctrine prevails in equity as well as at law, its operation is not there universal; it is subject to modifications and limitations; equity *does* sometimes exercise its jurisdiction on the occasion of mistakes of law. If the mistake of law is not pure and simple, but is induced or accompanied by other spe-

[1] The leading case of Bilbie v. Lumley, 2 East, 469, furnishes a good illustration of the general rule and of its reasons. An insurer, with knowledge of all the facts which destroyed his liability on a policy of insurance which he had signed, but in ignorance of the legal rights resulting from those facts, paid the amount he had assured; and afterwards he brought an action to recover back the money as paid under a mistake. The court held that the action could not be maintained. Lord Ellenborough said: "Every man must be taken to be cognizant of the law; otherwise, there is no saying to what extent the ignorance might not be carried. It would be urged in almost every case." If a legal question could be settled by numbers of judicial *dicta* expressed in the most general terms, there could be no doubt of the universality of the doctrine stated in the text. The following are some of the cases by which it is sustained: Snell v. Atlantic Ins. Co., 8 Otto, 85; De Give v. Healey, 60 Ga. 391; Ottenheimer v. Cook, 10 Heisk. 309; Jenkins v. German Luth. Cong., 58 Ga. 125; Hardigree v. Mitchum, 51 Ala. 151; Heavenridge v. Mondy, 49 Ind. 434; Gebb v. Rose, 40 Md. 387; Thurmond v. Clark, 47 Ga. 500; Bledsoe v. Nixon, 68 N. C. 521; Smith v. Penn, 22 Gratt. 402; Jacobs v. Morange, 47 N. Y. 57; Zollman v. Moore, 21 Gratt. 313; Goltra v. Sanasack, 53 Ill. 456; Bryant v. Mansfield, 22 Me. 360; Mellish v. Robertson, 25 Vt. 603; Proctor v. Thrall, 22 Id. 262; Shotwell v. Murray, 1 Johns. Ch. 512; Lyon v. Richmond, 2 Id. 51, 60, Storrs v. Barker, 6 Id. 166; Gilbert v. Gilbert, 9 Barb. 532; Garnar v. Bird, 57 Id. 277; Stoddard v. Hart, 23 N. Y. 556; Hinchman v. Emans, Saxt. 100; Wintermute v. Snyder, 2 Green's Ch. 489; Peters v. Florence, 38 Pa. St. 194; Good v. Herr, 7 W. & S. 253; State v. Reigart, 1 Gill, 1; Davis v. Bagley, 40 Ga. 181; Dill v. Shahan, 25 Ala. 694; Gwynn v. Hamilton, 29 Id. 233; Lyon v. Sanders, 23 Miss. 530; State v. Paup, 13 Ark. 129; McMurray v. St. Louis etc. Co., 33 Mo. 377; Rochester v. Alfred Bk., 13 Wisc. 432; Smith v. McDougal, 2 Cal. 586; Kenyon v. Welty, 20 Id. 637; Bk. of U. S. v. Daniel, 12 Pet. 32; Hunt v. Rousmanier, 8 Wheat. 174; 1 Pet. 1; 2 Mason, 342; Malden v. Menil, 2 Atk. 8; Cann v. Cann, 1 P. Wms. 723, 727; Currie v. Goold, 2 Madd. 163; Smith v. Jackson, 1 Id. 618; Goodman v. Sayers, 2 J. & W. 249, 263; Marshall v. Collett, 1 Y. & C. 232; Denys v. Shuckburgh, 4 Id. 42; Mellers v. Duke of Devonshire, 16 Beav. 252; Midland Gr. W. Co. v. Johnson, 6 H. L. Cas. 798.

cial facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, there can be no doubt that a court of equity will interpose its aid. Even when the mistake of law is pure and simple, equity *may* interfere. The difficulty is to ascertain any general criterion which shall determine and include all *such* cases. Many judges have attempted to formulate a criterion for all instances of pure mistakes of law which will be relieved in equity, but their conclusions are conflicting, and none is sustained by the authority of judicial decisions. It has been said by judges of the highest ability that the general doctrine heretofore stated, and embodied in the maxim *ignorantia juris non excusat*, is confined to mistakes of the general rules of law—the first class of mistakes described in the preceding paragraph; that it has no application to the mistakes of persons as to their own private legal rights and interests—the second class before described; that "*jus*" in the maxim denotes only the general law, the law of the country, and never means private legal rights.[1]

[1] This view is supported by the authority of Lord Westbury, certainly one of the ablest judges that ever sat in the English court of chancery, and distinguished for the remarkable grasp and clear enunciation of *principles* in all his opinions. In Cooper v. Phibbs, L. R., 2 H. L. 149, 170, he said: "In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said, '*ignorantia juris haud excusat;*' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; *but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights*, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties; the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement can not stand." It is proper to observe, that although Lord Westbury's general language is broad enough to cover both species embraced in my *second* class as described in the preceding paragraph, where the mistake is concerning a private legal right; yet the facts to which he applies his language fall exclusively under the *first* species of that class; namely, where the party is mistaken concerning his antecedent existing legal right which is to be affected by the agreement which he makes, and not concerning the legal import of the agreement itself. The same view will completely explain Lord King's decision in the celebrated case of Lansdowne v. Lansdowne, 2 J. & W. 205; Moseley, 364, 365, although the grounds were not so accurately stated by him as by Lord Westbury. The facts of this often-quoted case briefly were: The plaintiff was the only son of the *eldest* brother of a deceased intestate. He had a dispute with his uncle, a *younger* brother of the deceased, concerning their respective rights to inherit the land of the deceased. It was agreed by them to consult a schoolmaster, one Hughes. Hughes went for instruction to a book called the "Clerk's Remembrancer," and there found the law laid down that "land could not ascend, but always descended," and he thereupon informed the parties that the land went to the younger brother, the plaintiff's uncle. Upon this decision, the plaintiff and his uncle agreed to share the land between them, and con-

§ 843. **Mistake as to the Legal Import or Effect of a Transaction.**—That this rule, as suggested by Lord Westbury, would furnish a clear, definite, and in some respects a desirable criterion, can not be doubted; but it is not, in its full extent, sustained by authority; indeed, a portion of its conclusions is directly opposed to the overwhelming weight of judicial decisions. The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew or had an opportunity to know, the contents of an agreement or other instrument, can not defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole or of any of its provisions. Where the parties with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense, or grant a reformation or rescission although one of the parties—and as many cases hold both of them—may have mistaken or misconceived its legal meaning, scope, and effect.[1] The principle un-

veyances were executed carrying out this arrangement. . The result was, of course, that the plaintiff through a mistake of law, conveyed away land which clearly belonged to himself. Discovering his error subsequently, he filed a bill to be relieved. Lord Chan. King held that the conveyances were made through *a mistake and misrepresentation* of the law, and decreed that they should be surrendered up and canceled. He is reported to have said: "The maxim of law, *ignorantia juris non excusat*, was in regard to the public, that ignorance can not be pleaded in excuse of crimes, but did not hold in civil cases." This *dictum*, when taken literally, is much too broad, and is clearly incorrect; but the real doctrine lying beneath it, and what the chancellor plainly had in mind, is identical with the view expressed by Lord Westbury. This case, as it seems to me, has created a great deal of unnecessary difficulty and criticism. It falls directly within the first species of my second class of mistakes, and is a striking example of that species. See also Blakeman v. Blakeman, 39 Conn. 320.

[1] The circumstances mentioned in the text are the same as the second species of the second class described before in § 841, where a person knowing correctly his existing legal rights and relations, is mistaken as to the legal import of the transaction in which he engages, and of its legal effect upon those rights or relations. In Powell v. Smith, L. R., 14 Eq. 85, 90, Lord Romilly accurately states the doctrine of the text, and its reasons. The defendant endeavored to defeat the enforcement of an agreement to give a lease, on the ground that he was mistaken as to the legal meaning and effect of an important provision. The M. R. in overruling the defense said: "All those cases which have been cited on the argument are cases where there was either a dispute or doubt as to the thing sold, or where the words of the agreement ex-

derlying this rule is, that equity will not interfere for the purpose of carrying out an intention *which the parties did not have when they entered into a transaction*, but which they might or even would have had, if they had been more correctly informed as to the law—if they had not been mistaken as to the legal scope and effect of their transaction. If an agreement or written instrument, or other transaction expresses the thought and intention which the parties had at the time and in the act of concluding it, no relief, affirmative or defensive, will be granted with respect to it, upon the assumption that their thought and intention would have been different, if they had not been mistaken as to the legal meaning and effect of the terms and provisions by which such intention is embodied or expressed, even though it should be incontestably proved that their intention would have been different if they had been correctly informed as to the law. These rules are settled with perfect unanimity where one party has been mistaken in such a manner; they are

pressed certain things in an ambiguous manner, which might be misunderstood by one of the parties. [In such cases a decree for performance might be refused, because it did not appear with sufficient certainty *what* the parties had agreed.] But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now that is no ground of mistake at all. *It is a question upon the construction* of an agreement agreed to by everybody concerned." Hunt v. Rousmanier, 8 Wheat. 174; 1 Peters, 1, is the leading American case upon this phase of the doctrine, in which the rule and its limitations are most carefully examined; and the decision has been regarded as one of the highest authority. See, also, Gerald v. Elley, 45 Iowa, 322; Glenn v. Statler, 42 Id. 107; Nelson v. Davis, 40 Ind. 366; Fellows v. Heermans, 4 Lans. 230; Moorman v. Collier, 32 Iowa, 138; Hoover v. Reilly, 2 Abb. U. S. 471; Norris v. Laberee, 58 Me. 260; Kennard v. George, 44 N. H. 440; Mellish v. Robertson, 25 Vt. 603; Pettes v. B'k of Whitehall, 17 Id. 435; Goodell v. Field, 15 Id. 448; Molony v. Rourke, 100 Mass. 190; Haven v. Foster, 9 Pick. 111; Wheaton v. Wheaton, 9 Conn. 96; Leavitt v. Palmer, 3 N. Y. 19; Lanning v. Carpenter, 48 Id. 408; Pitcher v. Hennessey, 48 Id. 415; Story v. Conger, 36 Id. 673; O'Donnell v. Harmon, 3 Daly, 424; Champlin v. Laytin, 18 Wend. 407; Crosier v. Acer, 7 Paige, 137; Hall v. Reed, 2 Barb. Ch. 500; Dupre v. Thompson, 4 Barb. 279; Bentley v. Whittemore, 18 N. J. Eq. 366; Hawralty v. Warren, 18 Id. 124; Durant v. Bacot, 2 Beasl. 201; Garwood v. Eldridge, 1 Green's Ch. 145; Wintermute v. Snyder, 2 Id. 489; Light v. Light, 9 Harris, 407; Rankin v. Mortimere, 7 Watts, 372; McElderry v. Shipley, 2 Md. 25; Showman v. Miller, 6 Id. 479; Watkins v. Stockett, 6 Har. & J. 435; Alexander v. Newton, 2 Gratt. 266; Dill v. Shahan, 25 Ala. 694, 702; Clayton v. Freet, 10 Ohio St. 544; Evants v. Strode, 11 Ohio, 480; McNaughten v. Partridge, 11 Id. 223; Martin v. Hamlin, 18 Mich. 354; Barnes v. Bartlett, 47 Ind. 98; Heavenridge v. Mondy, 49 Id. 434; Wood v. Price, 46 Ill. 439; Adams v. Robertson, 37 Id. 45; Montgomery v. Shockey, 37 Iowa, 107; Heaton v. Fryberger, 38 Id. 185, 190, 201; Hearst v. Pujol, 44 Cal. 230; Great West. R'y v. Cripps, 5 Hare, 91; Croome v. Lediard, 2 My. & K. 251; Cockerell v. Cholmeley, 1 Russ. & My. 418; Marshall v. Collett, 1 Y. & C. Ex. 232, 238; Pullen v. Ready, 2 Atk. 587, 591; Stockley v. Stockley, 1 V. & B. 23, 30; Mildmay v. Hungerford, 2 Vern. 243; Irnham v. Child, 1 Bro. Ch. 92; Gibbons v. Caunt, 4 Ves. 840, 849; Marquis of Townshend v. Stangroom, 6 Id. 328, 332; Price v. Dyer, 17 Id. 356.

also applied by very many cases where the same mistake is common to both the parties.

§ 844. **Particular Instances in which Relief will or will not be Granted.**—Firmly settled as are the foregoing general rules, it is equally well settled that there are particular instances in which equity will grant defensive or affirmative relief from mistakes of law pure and simple, as well as from those accompanied by other inequitable incidents. The only difficulty consists, as has already been mentioned, in drawing any sharply defined lines by which all these instances may be accurately determined.[1] I shall endeavor to state those conclusions which seem to be based upon principle, as well as sustained by authority; although it must be conceded that no results can be reached which shall represent the unanimous concurrence of decisions and *dicta*. It is certain, however, that no mistake of law will be relieved from unless it is material, and the court is certain that the conduct of the parties has been determined by it.[2]

§ 845. **Reformation of an Instrument on Account of a Mistake of Law.**—The first instance which I shall mention is closely connected with the doctrine stated in the last paragraph but one. It was there shown that if an agreement is what it was intended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form, the instrument, *by means of a mistake of law*, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of *the contract actually made;* but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms

[1] Rogers v. Ingham, L. R., 3 Ch. D. 351, 355, 356, *per* James, L. J. p. 357, *per* Mellish, L. J.; *Ex parte* James, L. R., 9 Ch. 609; Bullock v. Downes, 9 H. L. Cas. 1; Stone v. Godfrey, 5 De G. M. & G. 76, 90, *per* Turner, L. J.; Broughton v. Hutt, 3 De G. & J. 501, 504.

[2] Stone v. Godfrey, 5 De G. M. & G. 76, 90, *per* Turner, L. J.

or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases; but the rule is not confined to these instances.[1]

§ 846. **Mistakes Common to all the Parties: Mistake of a Plain Rule.**—It has been said that whenever a mistake of law is common to all the parties, where they all act under the same misapprehension of the law, and make substantially the same mistake concerning it, this is a sufficient ground, without any other incidents, for the interposition of equity.[2] No such general rule, in my opinion, can be regarded as established, or even suggested, by the weight of authority; and it is certainly contradicted by well-considered decisions of most able courts.[3] It will be found, I think, that the instances of relief where the mistake of law was mutual, fall under the particular rule stated in the last preceding paragraph. It has also been asserted, as a general criterion, that where the mistake is concerning a clear, unquestioned, unequivocal rule of the law, a court of equity will relieve the party from its consequences; but where the mis-

[1] Hunt v. Rousmanier, 8 Wheat. 174; 1 Peters, 1; Pitcher v. Hennessey, 48 N. Y. 415, Lanning v. Carpenter, 48 Id. 408; O'Donnell v. Harmon, 3 Daly, 424; Gillespie v. Moon, 2 Johns. Ch. 585, 596; Canedy v. Marcy, 13 Gray, 373-377; Stedwell v. Anderson, 21 Conn. 139; Huss v. Morris, 63 Pa. St. (13 P. F. Sm.) 367; Moser v. Libenguth, 2 Rawle, 428; Cooke v. Husbands, 11 Md. 492; Springs v. Harven, 3 Jones' Eq. 96; Larkins v. Biddle; 21 Ala. 252; Stone v. Hale, 17 Id. 557; Clopton v. Martin, 11 Id. 187; Clayton v. Freet, 10 Ohio St. 544; Young v. Miller, 10 Ohio, 85; McNaughten v. Partridge, 11 Id. 223; Worley v. Tuggle, 4 Bush, 168; Smith v. Jordan, 13 Minn. 264; Sparks v. Pittman, 51 Miss. 511; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Oliver v. Mut. etc. Ins. Co., 2 Curtis' C. C., 277.

[2] The authors of the New York Civil Code lay down this rule as the leading element in their definition of "mistake of law," claiming it to be declaratory merely, and not new legislation (see *ante*, § 839). In support of it they cite Many v. Beekman Iron Co., 9 Paige, 188; Hall v. Reed, 2 Barb. Ch. 500. Mr. Kerr also states the same rule in a somewhat more limited form, and cites in its support only Cooper v. Phibbs, L. R., 2 H. L. 149. This case utterly fails to sustain any such conclusion. The decision of the court was based solely upon an assumed *mistake of fact*. The head note correctly states the rule on which the decision was placed. "Where two parties, *under a mistake of fact*, enter into an agreement," equity may set it aside. See, also, opinion of Lord Cranworth (p. 164). Lord Westbury's opinion dealt with the mistake as one of law, but he did not even hint at any such rule, and reached a very different conclusion, as already explained (see *ante*, § 842).

[3] In the recent case of Eaglesfield v. Marquis of Londonderry, L. R., 4 Ch. D. 693, 709, the court of appeal, so far from recognizing any such rule, placed their decision entirely upon the ground that both parties acted under a common misapprehension and mistake of the law, and therefore, without other circumstances, equity could not relieve. Undoubtedly, in many cases where equity has interfered, there has been a mutual mistake; but the interference must be referred to some other cause than the mere existence of that fact.

take is concerning a doubtful, obscure, or unsettled rule, no relief will be granted. In the first place, this proposition, if taken as a general rule, is directly opposed to the fundamental principle upon which the entire doctrine concerning mistakes of law is based. The presumption that every person knows the law, must necessarily extend to all rules of the law alike. To permit a distinction between rules said to be clear and those claimed to be doubtful, would at once open the door for all the evils in the administration of justice, which the presumption itself is intended to exclude. In the second place, the proposition finds no support, as a general rule, from the decisions of authority. All the cases in which such language was originally used by the judges, either as a *dictum* or as the *ratio decidendi*, were cases arising upon family compromises and settlements, which, as will appear hereafter, are governed by special considerations, whether they involve mistakes of law or of fact. The rule, so far as it may be called a rule, has a very restricted application, and can not be raised to the position of a general criterion.[1] There are, undoubtedly, cases not arising out of

[1] Judge Story seems to lay down this rule as one of the most prominent and important means for determining whether equity will or will not grant relief. Story Eq. Jur., §§ 121–126. He is followed by Mr. Snell. Snell's Prin. of Eq., pp. 371, 372. Mr. Adams states the proposition in a guarded, and in my opinion, accurate manner, confining it to cases of family compromises. Adams' Eq. 190 [marg. pag.] The important case of Stone v. Godfrey, 5 De G. M. & G. 76, cited in the notes to the American edition of Adams (pp. 386, 387), in support of this rule, does not even allude to it. It will be found that the cases referred to—at least the original authorities—as sustaining such a general proposition, are either cases arising upon family compromises, in which judges have used language applicable only to the particular facts before them, and explaining why the settlement in controversy should or should not be allowed to stand; or else they were cases decided upon entirely different grounds, and not involving the alleged general rule—cases in which the *ratio decidendi* as stated by the court, did not in the least turn upon the question whether the misapprehended rule of law was clear or doubtful. Of the first class, Naylor v. Winch, 1 S. & S. 555, 564, is a leading and striking example. It was a suit upon a family compromise which had been entered into in settlement of a family controversy as to the construction and meaning of a will. Sir John Leach, V. C., said: "If a party acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mistake. But where a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportions which may be agreed upon." The V. C. is clearly referring, in this language, to family compromises, and is not laying down a general rule for all forms of mistakes of law. See, also, Clifton v. Cockburn, 3 My. & K. 76. See, also, on the subject of doubtful rules, Freeman v. Curtis, 51 Me. 140; Jordan v. Stevens, 51 Id. 78; Reservoir Co. v. Chase, 14 Conn. 123; Champlin v. Laytin, 18 Wend. 407; 6 Paige, 189; 1 Edw. Ch. 467; Cooke v. Nathan, 16 Barb. 342; Green v. Morris etc. R. R., 1 Beasl. 165; Cumberland Coal Co. v. Sherman, 20 Md. 117; Lammott v. Maulsby, 8 Md. 5; Garner v.

family compromises, in which parties ignorant or mistaken concerning their *own clear legal rights*, have been relieved; but these will all find another explanation, more consonant with principle, than the foregoing alleged general rule.

§ 847. **Mistake of Law Accompanied with Inequitable Conduct of the Other Party.**—Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted, when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be effected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party. When the mistake of law is pure and simple, the balance held by justice hangs even; but when the error is accompanied by any inequitable conduct of the other party, it inclines in favor of the one who is mistaken. The scope and limitations of this doctrine may be summed up in the proposition, that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief. A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of, and did not correct. While equity interposes under such circumstances, it follows *a fortiori*, that when the mistake of law by one party is induced, aided, or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error. The decisions illustrating this general rule are numerous, and it will be found that many of the cases in which relief has been granted, contained, either openly or implicitly, some elements of such inequitable conduct.[1]

Garner, 1 Desau. 437; Lowndes v. Chisolm, 2 McCord Eq. 455; Mortimer v. Pritchard, 1 Bailey Eq. 505; Hadon v. Ware, 15 Ala. 149; Moreland v. Atchison, 19 Tex. 303.

[1] Fane v. Fane, L. R., 20 Eq. 698; Gee v. Spencer, 1 Vern. 32; Mildmay v. Hungerford, 2 Id. 243; Willan v. Willan, 16 Ves. 72, 82; Ramsden v. Hylton, 2 Ves. Sen. 304; Cocking v. Pratt, 1 Id. 400; McCarthy v. Decaix, 2 Russ. & M. 614; Scholefield v. Templer, Johns. 155, 166; Coward v. Hughes, 1 K. & J. 443;

§ 848. **Same: Between Parties in Relations of Trust.**—A particular application of the foregoing rule requires a special mention. Where an ignorance or misapprehension of the law, even without any positive, incorrect, or misleading words or incidental acts, occurs in a transaction concerning the trust between two parties holding close relations of trust and confidence, injuriously affecting the one who reposes the confidence, equity will, in general, relieve the one who has thus been injured. The relations of trustee and *cestui que trust*, guardian and ward, and the like, are examples. The relief is here based upon the close confidence reposed; upon the duty of the trustee to act in the most perfect good faith, to consult the interests of the beneficiary, not to mislead him, and not even to suffer him to be misled, when such a result can be prevented by reasonable diligence and prudence.[1]

§ 849. **Relief where a Party is Mistaken as to His Own Existing Legal Rights, Interests, or Relations.**—Is it possible to formulate any general rule which shall be a criterion for all cases of relief from mistakes of law pure and simple, and without other incidental circumstances, which shall be sustained by judicial authority, and which shall furnish a *principle* as guide for future decisions? In my opinion it is possible. It has been shown that where the general law of the land—the common *jus*—is involved, a pure and simple mistake in any kind of transaction can not be relieved. Also, where a person correctly apprehends his own legal rights, interests, and relations,

Sturge v. Sturge, 12 Beav. 229; Broughton v. Hutt, 3 De G. & J. 501; *In re* Saxon etc. Co., 1 De G. J. & S. 29; 2 J. & H. 408; Jordan v. Stevens, 51 Me. 78; Freeman v. Curtis, Id. 140; Spurr v. Benedict, 99 Mass. 463; Chestnut Hill etc. Co. v. Chase, 14 Conn. 123; Woodbury etc. B'k v. Charter Oak Ins. Co., 31 Id. 517; Champlin v. Laytin, 18 Wend. 407, 422; Rider v. Powell, 28 N. Y. 310; Green v. Morris etc. R. R., 1 Beasl. 165; Whelan's Appeal, 70 Pa. St. 410, 425; Light v. Light, 9 Harris, 407, 412; Snyder v. May, 7 Id. 235; Tyson v. Passmore, 2 Barr. 122; Watts v. Cummins, 59 Pa. St. 84; Phillips v. Hollister, 2 Coldw. 269; Bryan v. Masterson, 4 J. J. Marsh. 225; Hardigree v. Mitchum, 51 Ala. 151; Metropolitan B'k v. Godfrey, 23 Ill. 579; Cathcart v. Robinson, 5 Pet. 264, 276; Wheeler v. Smith, 9 How. (U. S.) 55.

Cases of Surprise.—Evans v. Llewellyn, 2 Bro. Ch. 150; 1 Cox, 333; Pusey v. Desbouvrie, 3 P. Wms. 315; Willan v. Willan, 16 Ves. 72, 81; Ormond v. Hutchinson, 13 Id. 47; Marquis of Townshend v. Stangroom, 6 Id. 328, 333, 338; Clowes v. Higginson, 1 V. & B. 524, 527; Farewell v. Coker, 2 Meriv. 353; Cochrane v. Willis, L. R., 1 Ch. 58; Tyson v. Tyson, 31 Md. 134; Jones v. Munroe, 32 Ga. 181; Harney v. Charles, 45 Mo. 157; Carley v. Lewis, 24 Ind. 23. Some of these cases, which are commonly referred to the effect of surprise, are much more naturally and correctly explained, in my opinion, by the doctrine stated in § 849 of the text.

[1] Langstaffe v. Fenwick, 10 Ves. 405; and see Cooke v. Nathan, 16 Barb. 342; Dill v. Shahan, 25 Ala. 694; Moreland v. Atchison, 19 Tex. 303; *Ex parte* James, L. R., 9 Ch. 609, 614; Davis v. Morier, 2 Coll. 303; and cases cited under last paragraph.

a simple mistake as to the legal effect of a transaction into which he enters, in the absence of other determining incidents, is not ground for relief. There is, as shown in a former paragraph (§ 841), a third condition. A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, duties, liabilities, or other relations, while he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. It will be found that the great majority, if not indeed all, of the well-considered decisions in which relief has been extended to mistakes pure and simple, fall within this class; and, also, that whenever cases of this kind have arisen, *relief has almost always been granted*, although not always on this ground. Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so, some inequitable conduct of the other party which they have inferred or assumed. The *real reason* for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty, or liability is always *a very complex conception*. It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities, may be properly regarded—as in great measure they really are—and may be dealt with as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avowedly. Lord Westbury openly declares that such misconceptions are truly mistakes of fact. Some very instructive remarks of Sir George Jessel, which I have placed in the foot-note, will, with a slight modification of his language, apply to all instances involving this kind of error or ignorance.[1] A general rule per-

[1] Eaglesfield v. Marquis of Londonderry, L. R., 4 Ch. D. 693, 702, 703. The M. R. is speaking of a misrepresentation of the law affecting a person's private rights, but his language, with slight change, will apply to all cases of ignorance or error concerning one's own private legal interests. In my opinion it suggests the true *principle* upon which to rest the action of the courts in all such instances. "It was put to me that this was a misrepresentation of law and not of fact. * * * Was it a misrepresentation of law? A misrepresentation of law is this: When you state the facts, and state a conclusion of law, *so as to distinguish between facts and law*. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may, she is a single woman of large fortune.' It turns

mitting the jurisdiction of equity to relieve from mistakes of the law pure and simple, in all cases belonging to this species, and confining its operation to them, would at once reduce to clearness, order, and certainty a subject which has hitherto been confessedly uncertain and confused. It would work justice, for these kinds of errors stand upon a different footing from all others, and justice and good conscience demand their relief; it would conform to sound principle, for these mistakes are, in part, essentially errors of fact; and finally it would explain and harmonize many decisions of the ablest courts which have hitherto seemed almost inexplicable except by violent and unnatural assumptions. I therefore venture to formulate the following general rule as being eminently just and based on principle and furnishing a simple criterion defining the extent of the jurisdiction. The number of decisions which support it, and which it explains, is very great. Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property, or contract, or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the

out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that the marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, 'Now you see the lady is single,' that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law. There is not a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to say it is not a representation of fact seems to arise from a confusion of ideas. It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you say that a man is in possession of an estate of ten thousand pounds a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to ten thousand pounds consols, involves all sorts of law." The *decision* of the M. R. in this case was reversed by the court of appeal, but only upon a different view of the evidence from that which he took, and without in the least affecting the correctness of the observations which I have quoted.

mistake as analogous to, if not identical with, a mistake of fact.[1] It should be carefully observed that this rule has no application to cases of compromise, where doubts have arisen as to the rights of parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or of fact, are governed by special considerations.

[1] It is not claimed that all these cases were avowedly decided upon the above rule, although many of them seem to distinctly recognize it. In all of them the error was of the kind described in the text, and the rule will furnish a simple reason why relief was granted, which the judges sometimes failed to do. Cooper v. Phibbs, L. R., 2 H. L. 149 (A. being ignorant that certain property belonged to himself, and supposing that it belonged to B., agreed to take a lease of it from B. at a certain rent. There was no fraud, no unfair conduct, all the parties equally knew the facts. The House of Lords set aside the agreement on account of the mistake. A majority of the judges called it a mistake of fact. Lord Westbury boldly acknowledged it to be what is ordinarily called a mistake of law, but held that it was really a mistake of fact and to be dealt with as such. The mistake was clearly one to which the term "mistake of law" has ordinarily been applied; but it as clearly possessed the elements of a mistake of fact. The decision is a direct authority in support of the text); Bingham v. Bingham, 1 Ves. Sen. 126; Landsdowne v. Landsdowne, 2 J. & W. 205; Mosley, 364; Cocking v. Pratt, 1 Ves. Sen. 400; Pusey v. Desbouvrie, 3 P. Wms. 315, 320; Cann v. Cann, 1 P. Wms. 723, 727; Marquis of Townshend v. Stangroom, 6 Ves. 328, 332; Broughton v. Hutt, 3 De G. & J. 501, 504 (the heir of a stockholder in a company, the shares in which were personal estate, supposing himself liable in respect of his ancestor's shares, gave a deed of indemnity to the company. This deed was ordered to be canceled on the ground of the mistake which was treated as one of fact as well as law); *In re* Saxon L. Ins. Co., 1 De G. J. & S. 29; 2 J. & H. 408; McCarthy v. Decaix, 2 Russ. & My. 614; Clifton v. Cockburn, 3 My. & K. 76, 99; Coward v. Hughes, 1 K. & J. 443; Sturge v. Sturge, 12 Beav. 229; Davis v. Morier, 2 Coll. 303; Denys v. Shuckburgh, 4 Y. & C. 42; Reynell v. Sprye, 8 Hare, 222, 255; Ramsden v. Hylton, 2 Ves. Sen. 304; Gee v. Spencer, 1 Vern. 32; Mildmay v. Hungerford, 2 Vern. 243; Naylor v. Winch, 1 S. & S. 555; Farewell v. Coker, cited 2 Meriv. 353. In Reynell v. Sprye, *supra*, V. C. Wigram laid down the rule in complete harmony with the positions maintained in the text: "I will not attempt to define the cases in which relief is given on the ground of ignorance or mistake. They may, however, safely be distinguished from cases in which, doubts having arisen as to the rights of parties, an arrangement is made for compromising those doubts. But if parties are ignorant of facts on which their rights depend, *or erroneously assume that they know those rights*, and deal with their property accordingly, not upon the principle of compromising doubts, this court will relieve against such transactions (citing Stockley v. Stockley, 1 V. & B. 23; Harvey v. Cooke, 4 Russ, 34)." Blakeman v. Blakeman, 39 Conn. 320, is directly in point, and is a striking illustration. A right of way had become extinguished by the purchase of the servient estate by A., the owner of the dominant estate. A. afterwards conveyed the dominant estate to B. by a deed which granted the land "with its privileges and appurtenances," but did not in express terms mention the right of way. A. and B. were both ignorant of the legal rule under which the right of way had become extinguished, and supposed it still existed; and the price paid by B. was sufficient to cover the right of way. *Held*, that a court of equity would relieve B. by correcting the mistake. The court expressly held that there was no mistake as to the legal scope and effect of the deed, since its terms were sufficient to have conveyed the way if it had existed. It will be noticed that there was no ignorance nor error as to the external facts. The mistake was solely as to the legal interest, the right

§ 850. **Compromises and Voluntary Settlements Made upon a Mistake as to Legal Rights.**—Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties, instead of ascertaining and enforcing their mutual rights and obligations which are yet undetermined and uncertain, intentionally put an end to all controversy by a voluntary transaction in the way of a compromise, are highly favored by courts of equity; they will not be disturbed for any ordinary mistake either of law or of fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without a judicial controversy. There are, indeed, *dicta* to the effect that a party will be relieved from a compromise in which he has surrendered property or other rights unquestionably his own, through a misconception of a clear legal rule, or an erroneous supposition that a legal duty rested upon him, whereas plainly no such duty existed; but the decisions show that these *dicta* must be confined to circumstances which render the compromise itself a virtual surprise, or to cases in which it was induced by positive inequitable conduct of the other parties.[1] Voluntary settlements are so favored, that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge, or means of obtaining knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision.[2] Of course there must not

of property held by A. and to be affected by the conveyance. This mistake was clearly one to which the term "mistake of law" is ordinarily applied, and yet the court correctly held it to be essentially a mistake of fact, and dealt with it as such. There could be no more admirable an illustration of the remarks of Sir G. Jessel, quoted in a preceding note. See, also, Whelen's Appeal, 70 Pa St. 410; Hearst v. Pujol, 44 Cal. 230; Morgan v. Dod, 3 Col. 551. Zollman v. Moore, 21 Gratt. 313, is directly conflicting. If the position of the text is correct, it can not be sustained; and on any view it seems opposed to the weight of authority, English and American.

[1] Naylor v. Winch, 1 S. & S. 555, 564; Bingham v. Bingham, 1 Ves. Sen. 126; and see Willan v. Willan, 16 Ves. 72; Gross v. Leber, 11 Wright, 520; Light v. Light, 9 Harris, 407, 412; Cabot v. Haskins, 3 Pick. 83; Larkins v. Biddle, 21 Ala. 252, 256.

[2] Stapilton v. Stapilton, 1 Atk. 2; 2 Eq. Lead. Cas. and notes, 1675 (4th Am. ed.); Naylor v. Winch, 1 S. & S. 555; *Ex parte* Lucy, 4 De G. M. & G. 356; Brooke v. Lord Mostyn, 2 De G. J. & S. 373; Bullock v. Downes, 9 H. L. Cas. 1; Stewart v. Stewart, 6 Cl. & Fin. 911, 969; Trigge v. Lavallée, 15

only be no representation, imposition, or concealment, there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others. In the words of a distinguished judge: "There must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient." If these requisites of good faith exist, it is not necessary that the dispute should be concerning a question really doubtful, if the parties *bona fide* consider it so; it is enough that there is a question between them to be settled by their compromise.[1] The foregoing rules apply to all cases of compromise, whether the doubtful questions to be settled relate to matters of law or of fact.[2]

§ 851. **Payments of Money under a Mistake of Law.**— The general rule stated in the paragraph before the last, concerning mistakes as to one's own private legal rights and duties, is also subject to another important limitation. It is settled at law, and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, but with full knowledge, or with means of obtaining knowledge, of all the circumstances, can not be recovered back.[3]

Moore P. C. 270; Parker v. Palmer, 1 Cas. in Ch. 42; Baxendale v. Seale, 19 Beav. 601; Pickering v. Pickering, 2 Id. 31, 56; Lawton v. Campion, 18 Id. 87; Heap v. Tonge, 9 Hare, 90; Reynell v. Sprye, 8 Id. 222, 254; Gordon v. Gordon, 3 Sw. 400, 463; Westby v. Westby, 2 Dr. & War. 502; Leonard v. Leonard, 2 Ball & B. 176, 179; Neale v. Neale, 1 Keen, 672; Greenwood v. Greenwood, 2 De G. J. & S. 28, 42, *per* Turner, L. J.; Harvey v. Cooke, 4 Russ. 34; Attwood v. ——, 5 Russ, 149; Clifton v. Cockburn, 3 My. & K. 76; Good v. Herr, 7 Watts & Serg. 253; Stub v. Leis, 7 Watts, 43; Shartel's Appeal, 64 Pa. St. (14 P. F. Sm.) 25; Wistar's Appeal, 80 Pa. St. (30 P. F. Sm.) 484; Brandon v. Medley, 1 Jones' Eq. 313; Bell v. Lawrence, 51 Ala. 160. The requirement of complete frankness and full disclosure applies with especial force when the parties stand towards each other in any prior existing relation of trust and confidence. See Pusey v. Desbouvrie, 3 P. Wms. 315; Sturge v. Sturge, 12 Beav. 229.

[1] *Ex parte* Lucy, 4 De G. M. & G. 356; Neale v. Neale, 1 Keen, 672.

[2] Neale v. Neale, 1 Keen, 672; Westby v. Westby, 2 Dr. & War. 502; and see *post*, § 855, and cases there cited.

[3] Bilbie v. Lumley, 2 East, 469; Rogers v. Ingham, L. R., 3 Ch. D. 351, 356, 357; Bate v. Hooper, 5 De G. M. & G. 338; Stafford v. Stafford, 1 De G. & J. 193, 197; Great West. Ry. v. Cripps, 5 Hare, 91; Drewry v. Barnes, 3 Russ. 94; Goodman v. Sayers, 2 J. & W. 249, 263; Currie v. Goold, 2 Madd. 163; Railroad Co. v. Soutter, 13 Wall. 517, 524; Bk of U. S. v. Daniel, 12 Peters, 32; Elliott v. Swartout, 10 Id. 137; Haven v. Foster, 9 Pick. 112; Clarke v. Dutcher, 9 Cow. 674; Ege v. Koontz, 3 Barr. 109; Shotwell v. Murray, 1 Johns. Ch. 512, 516; Storrs v. Barker, 6 Id. 166; Livermore v. Peru, 55 Me. 469. If the doctrine formulated in § 849 be correct, then it seems that this particular rule forbidding the recovery back of money paid under a mistake of law, is based upon an erroneous conception of the principle which should govern such cases; and the opinions of those jurists which uphold the right of recovery, quoted *ante* in the note under § 841, appear to be correct in principle. This rule itself is an illustration of the disinclination of equity courts to depart

There is an exception, as in the case of compromises, when the erroneous payment is induced or accompanied by a violation of confidence reposed, lack of full disclosure, misrepresentation as to liability, or other similar inequitable conduct.[1]

§ 852. **Second. Mistakes of Facts.**—The general doctrine is firmly settled as one of the elementary principles of the equitable jurisdiction, that a court of equity will grant its affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some legal duty, provided that no adequate remedy can be had at law. It has been said, "no person can be presumed to be acquainted with all matters of fact connected with a transaction in which he engages." This general doctrine is applied in a great variety of forms, and under a great variety of circumstances. It presents but few *theoretical* difficulties; its practical difficulties arise from its application to particular instances of relief, and this application must be largely controlled by the circumstances of each case.

§ 853. **How Mistakes of Fact may Occur.**—All mistakes of fact in agreements executed or executory, express or implied, must be concerning either the subject-matter or the terms. In the first case, the terms are stated according to the intent of both the parties, but there is an error of one or both in respect of the thing to which these terms apply—its identity, situation, boundaries, title, amount, value, and the like. Such a mistake may relate to any kind of subject-matter, and may occur in a verbal as well as in a written agreement. In the second case, the mistake may arise *after* the parties have verbally concluded their agreement, and may occur in reducing that agreement to writing, by erroneously adding, omitting, or altering some term; or it may arise in the very process of making the agreement, during the negotiation itself, one or both the parties misconceiving, misunderstanding, or even being entirely ignorant of some term or provision; so that, although they *appear* to have made an agreement, yet in fact their minds never met upon the same matters. While this latter species of error is not infrequent, it generally consists in a mistake or ignorance as to the *legal effect* of the provision, rather than as to the language in

from a doctrine settled at law, when the rights and the remedies are the same in both jurisdictions.

[1] Bingham v. Bingham, 1 Ves. Sen. 126; Davis v. Morier, 2 Coll. 303; *Ex parte* James, L. R., 9 Ch. 609; Rogers v. Ingham, L. R., 3 Ch. D. 351, 356; Pusey v. Desbouvrie, 3 P. Wms. 315.

which the provision is expressed. The same description will plainly apply to all forms of mistakes of fact in transactions which are not agreements.

§ 854. **In What Mistakes of Fact may Consist.**—It would be impossible, within any reasonable limits, to enumerate the various forms in which mistakes of fact may appear; and such an enumeration is not at all necessary; some important illustrations will be given in subsequent chapters which treat of reformation and cancellation. A general description of all the possible phases will be sufficient. It will be remembered that the essential element of mistake was defined to be a *mental* condition or conception or conviction of the understanding. This mental condition may be either a *passive* state, or an *active* conviction. When merely passive, it may consist of an unconsciousness, an ignorance, or a forgetfulness; when active, it must be a belief. In the first of these two conditions, the unconsciousness, ignorance, or forgetfulness may be either of a fact which is present and now existing, or of a fact which is past and has existed; they must always concern a *fact* material to the transaction. In the second condition, the belief may be either that a certain matter or thing exists at the present time, which really does not exist; or that a certain matter or thing existed at some past time, which did not really exist. All possible forms of mistakes of fact are embraced within this description; and all particular errors which fall under any of these conditions are mistakes of fact which furnish an occasion for equitable relief.[1] The law of a foreign country or of another state is always regarded as a "fact," within the meaning of the term as used in the foregoing description; an error or ignorance concerning such law is therefore a mistake of fact.[2] It necessarily follows from this description that where an act is done intentionally and with knowledge, the doing the act can not be treated as a mistake. Thus, if parties knowingly and intentionally add to, or omit from, their written agreement, a certain provision, such adding to or omission can not constitute a mistake, so as to be a ground for relief.[3]

[1] See *ante*, cases under § 839.

[2] McCormick v. Garnett, 5 De G. M. & G. 278; Leslie v. Baillie, 2 Y. & C. 91; Haven v. Foster, 9 Pick. 111; B'k of Chillicothe v. Dodge, 8 Barb. 233; Merch. B'k v. Spalding, 12 Id. 302; Patterson v. Bloomer, 35 Conn. 57.

[3] The exact import of this rule should not be misapprehended. The parties may be in error as to the *legal effect* of the addition or omission; this would be a mistake of law which, as has been shown, would not be relieved. They *might* also be mistaken as to the subject-matter of the provision added or omitted, or *possibly* as to its language, and such an error might be a mistake of fact. The rule of the text simply declares, that when an act is

§ 855. **Compromises and Speculative Contracts.**—When parties have entered into a contract or arrangement based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them; and where parties have knowingly entered into a speculative contract or transaction—one in which they intentionally speculated as to the result; and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph; if the facts upon which such agreement or transaction was founded, or the event of the agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief either by way of canceling the contract and rescinding the transaction, or of defense to a suit brought for its enforcement. In such classes of agreements and transactions, the parties are sup-

done intentionally and knowingly, the *very doing itself* can not be treated as a mistake entitled to relief; the elements of knowledge and intention contradict the essential conception of mistake. See Marquis of Townshend v. Stangroom, 6 Ves. 328, 332; Lord Irnham v. Child, 1 Bro. Ch. 92; Lord Portmore v. Morris, 2 Id. 219; Hare v. Shearwood, 3 Id. 168; Cripps v. Jee, 4 Id. 472; Pitcairn v. Ogbourne, 2 Ves. Sen. 375; Betts v. Gunn, 31 Ala. 219.

Where a verbal stipulation is made at the same time as the written contract, and is omitted intentionally on the faith of an assurance that it shall be as binding as though incorporated into the writing, the rule as generally settled does not permit such provision to be proved and enforced. It is said that, there being no fraud or mistake, to allow the verbal term to be proved by parol evidence, and the written agreement to be thereby varied, would be a violation of the statute of frauds, and would introduce all the evils which the statute was designed to prevent. The relief given in cases of fraud and mistake stands upon different grounds; although *appearing* to conflict with the statute, it is really carrying out the ultimate purposes of the legislature by preventing injustice. No such grounds, it is said, exist where parties have intentionally omitted provisions from their written agreements. See cases cited above; also, Stevens v. Cooper, 1 Johns. Ch. 425; Dwight v. Pomeroy, 17 Mass. 303; Towner v. Lucas, 13 Gratt. 705; Broughton v. Coffer, 18 Id. 184; Knight v. Bunn, 7 Ired. Eq. 77; Westbrook v. Harbeson, 2 McCord Eq. 112; Ware v. Cowles, 24 Ala. 446. There are cases, however, which seem to reject this conclusion, and allow the verbal stipulation to be proved and enforced, and the written agreement to be reformed; on the ground that the refusal to abide by the whole agreement, and the attempt to enforce that portion only which is written, constitute a fraud which equity ought to prohibit. See Murray v. Dake, 46 Cal. 644; Taylor v. Gilman, 25 Vt. 411; Coger's Ex'rs v. Magee, 2 Bibb, 321; Rearich v. Swinehart, 1 Jones (Pa.) 233; Renshaw v. Gans, 7 Barr. 119; Clark v. Partridge, 2 Id. 13; 4 Id. 166; Oliver v. Oliver, 4 Rawle, 141; Miller v. Henderson, 10 S. & R. 290; Campbell v. McClenachan, 6 Id. 171. Whether affirmative relief be permitted or not, the omitted verbal portion of the entire agreement may be set up by way of *defense* in equity, when an attempt is made to enforce the written part alone. Jervis v. Berridge, L. R., 8 Ch. 351 (a very important case); and see Quinn v. Roath, 37 Conn. 16; Murray v. Dake, 46 Cal. 644.

posed to calculate the chances, and they certainly assume the risks where there is no element of bad faith, breach of confidence, misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud.[1]

§ 856. **Requisites to Relief: Mistake must be Material and Free from Culpable Negligence.**—There are two requisites essential to the exercise of the equitable jurisdiction in giving any relief defensive or affirmative. The fact concerning which the mistake is made must be material to the transaction, affecting its substance and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essential to any of its terms; or if the complaining party fails to show that his conduct was in reality determined by it; in either case the mistake will not be ground for any relief affirmative or defensive.[2] As a second requisite, it has sometimes been said in very general terms, that a mistake resulting from the complaining party's own negli-

[1] Stapilton v. Stapilton, 1 Atk. 2; 2 Eq. Lead. Cas. 1675, and notes (4th Am. ed.); Jefferys v. Fairs, L. R., 4 Ch. D. 448; Pickering v. Pickering, 2 Beav. 31, 56; Lawton v. Campion, 18 Id. 87; Baxendale v. Seale, 19 Id. 601; Haywood v. Cope, 25 Beav. 140; Colby v. Gadsden, 34 Id. 416; Jennings v. Broughton, 17 Id. 234; Mellers v. Duke of Devonshire, 16 Id. 252; Stanton v. Tattersall, 1 Sm. & Giff. 529; Ridgway v. Sneyd, Kay, 627; Parker v. Palmer, 1 Cas. in Ch. 42; Anon. cited in Cooth v. Jackson, 6 Ves. 24; *Ex parte* Peake, 1 Madd. 346, 355; Cann v. Cann, 1 P. Wms. 722, 727; Stockley v. Stockley, 1 V. & B. 23, 29, 31; Naylor v. Winch, 1 S. & S. 555; Goodman v. Sayers, 2 J. & W. 249, 263; Dunnage v. White, 1 Sw. 137, 151, 152; Gordon v. Gordon, 3 Id. 400, 470; Harvey v. Cooke, 4 Russ. 34; Leonard v. Leonard, 2 Ball & B. 171, 179, 180; Stewart v. Stewart, 6 Cl. & Fin. 911, 969; Shotwell v. Murray, 1 Johns. Ch. 512, 516; Good v. Herr, 7 W. & S. 253; Brandon v. Medley, 1 Jones' Eq. 313; Durham v. Wadlington, 2 Strobh. Eq. 258; Williams v. Sneed, 3 Coldw. 533; Stover v. Mitchell, 45 Ill. 213; Bell v. Lawrence, 51 Ala. 160; and see *ante*, § 850, and cases cited.

It is to this kind of agreements and transactions that the rules properly apply which have sometimes been incorrectly laid down as requisite to relief in all species of mistakes (see 1 Story Eq. Jur., §§ 146–149; Snell's Eq., p. 376), viz., that if the party could by reasonable diligence have obtained knowledge of the facts, equity will not relieve; also when means of information are equally open to both parties, and no confidence is reposed, and there is no violation of a duty to disclose, equity will not relieve. See Pickering v. Pickering, 2 Beav. 31, 56, *per* Lord Langdale; and Clapham v. Shillito, 7 Beav. 146, 149, 150.

[2] Stone v. Godfrey, 5 De G. M. & G. 76, 90, *per* Turner, L. J.; Okill v. Whittaker, 1 De G. & Sm. 83; 2 Phill. 338; Trigge v. Lavallée, 15 Moore, P. C., 270, 276; Carpmael v. Powis, 10 Beav. 36, 39; Penny v. Martin, 4 Johns. Ch. 566; Segur v. Tingley, 11 Conn. 134; Weaver v. Carter, 10 Leigh, 37; Trigg v. Read, 5 Humph. 529; M'Ferran v. Taylor, 3 Cranch, 270; Henderson v. Dickey, 35 Mo. 120; Paulison v. Van Iderstine, 28 N. J. Eq. 306; Dambmann v. Schulting, 75 N. Y. 55, 63; Stettheimer v. Killip, 75 Id. 282.

gence, will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say, that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances.[1] It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby.[2] In addition to the two foregoing requisites, it has been said that equity would never give any relief from a mistake, if the party could by reasonable diligence have ascertained the real facts; nor where the means of information are open to both parties and no

[1] Duke of Beaufort v. Neeld, 12 Cl. & Fin. 248, 286; Leuty v. Hillas, 2 De G. & J. 110; Wild v. Hillas, 28 L. J. Ch. 170; Besley v. Besley, L. R., 9 Ch. D. 103; West. R. R. v. Babcock, 6 Met. 346; Diman v. Providence R. R., 5 R. I. 130; Voorhis v. Murphy, 26 N. J. Eq. 434; Dillett v. Kemble, 25 Id. 66; Haggerty v. McCanna, 25 Id. 48; Wood v. Patterson, 4 Md. Ch. 335; Capehart v. Mhoon, 5 Jones Eq. 178; Lewis v. Lewis. 5 Oreg. 169; Ferson v. Sanger, 1 Wood. & Min. 138; and see cases *ante*, under § 839. As examples: Under the original form of the two jurisdictions, a party who had a good defense or cause of action at law, and through negligence failed to set it up or enforce it, could not obtain relief in equity. Stephenson v. Wilson, 2 Vern. 325; Ware v. Horwood, 14 Ves. 29, 31; Drewry v. Barnes, 3 Russ. 94; Bateman v. Willoe, 1 Sch. & Lef. 201. The purchaser of an estate, who had been compelled to give it up from a defect in the title which his attorney had carelessly overlooked, could not recover back the purchase price which he had paid. Urmston v. Pate, 3 Ves. 235 n.; and see Cator v. Lord Pembroke, 1 Bro. Ch. 301; 2 Id. 282; Thomas v. Powell, 2 Cox, 394. When a person neglects to perform some legal obligation, and thereby incurs a forfeiture, equity will not relieve therefrom. Gregory v. Wilson, 9 Hare, 683, 689; and see *ante*, § 452. And if a person executes an instrument carelessly, without even reading it, equity may refuse to relieve him from the consequences of errors in its contents. Glenn v. Statler, 42 Iowa, 107, 110; and see Butman v. Hussey, 30 Me. 263; Juzan v. Toulmin, 9 Ala. 662; Hill v. Bush, 19 Ark. 522.

[2] U. S. Bank v. B'k of Georgia, 10 Wheat. 333, 343; Mayer v. Mayor etc., 63 N. Y. 455; Snyder v. Ives, 42 Iowa, 157, 162; and see cases at the commencement of last note. In this connection, there are *dicta*, followed by some of the text-writers, that a mistake concerning matters as to which the party had "means of knowledge," or "might have ascertained the truth," etc., will not be relieved from. See Mut. L. Ins. Co. v. Wager, 27 Barb. 354; Clarke v. Dutcher, 9 Cow. 674. These *dicta* can not be accepted as correct. They are inconsistent with decisions, and have been expressly overruled. See Kelly v. Solari, 9 M. & W. 54; Townsend v. Crowdy, 8 C. B. N. S. 477; Bell v. Gardiner, 4 M. & G. 11; Dails v. Lloyd, 12 Q. B. 531; Allen v. Mayor etc., 4 E. D. Smith, 404. These are decisions at law, but the same would *a fortiori* be true in equity.

confidence is reposed; nor unless the other party was under some obligation to disclose the facts known to himself and concealed them.[1] A moment's reflection will clearly show that these rules can not possibly apply to all instances of mistake, and furnish the prerequisites for all species of relief. Their operation is, indeed, quite narrow; it is confined to the single relief of cancellation, and even then it is restricted to certain special kinds of agreements.[2]

§ 857. **III. How Mistake may be Shown: When by Parol Evidence.**—The next important matter to be considered is, the mode of showing any mistake which may furnish an occasion for the exercise of equitable jurisdiction and the granting of equitable relief; and practically this is reduced to the question: When is extrinsic parol evidence admissible to establish a mistake in written instruments, and obtain the appropriate remedy? Whenever any suit or defense arises from a mistake in some transaction, not in the body of a written instrument, and not controlled by the statute of frauds nor by the settled rules concerning written evidence—as, for example, a suit to recover back money paid through mistake—since the entire transaction may be parol, there can be no doubt that the mistake may be proved by parol evidence. The whole right of action or of defense in such case may depend upon verbal proofs. It is only in cases of mistakes in writings, that any difficulty is possible. The following comprise all the modes in which the question can be presented, and furnish a natural order of discussion: (1) In suits expressly brought to reform or to cancel written instruments on account of mistake; (2) Where the mistake is set up as a defense in suits brought to specifically enforce written instruments; (3) When the plaintiff alleges mistake in a written instrument, and seeks to have it enforced as corrected. There will be added, (4) an examination of the question, How far the admission of parol evidence is limited in general by the statute of frauds?

[1] In Story's Eq. Jur. these rules are laid down in most general terms, without limitation, as though they belonged to every kind of mistake and form of relief (§§ 146–148). Mr. Snell adopts them in the same unreserved manner (p. 376). The utter impossibility of applying such requisites in all instances of a common mistake by both the parties, and in granting the most important remedy of reformation, is evident; there is a contradiction in terms between these requirements and the very conception of a common mistake. Even where only one party is mistaken, and alleges the error as ground of defense or of rescission, to make these requisites ordinarily applicable, would contradict the decisions concerning negligence cited in the last note, and would curtail the relief far within the well-established limits.

[2] See note under the preceding paragraph (§ 855), and cases at the end of the last note but one.

§ 858. **Parol Evidence in Cases of Mistake, Fraud, or Surprise.**—It is an elementary doctrine that parol evidence is not, in general, admissible between the parties to vary a written instrument, whether the same has been voluntarily adopted, or made in pursuance of a legal necessity.[1] It is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to this otherwise universal doctrine. Parol evidence may, in proper modes and within proper limits, be admitted to vary written instruments upon the ground of mistake, fraud, surprise, and accident. This exception rests upon the highest motives of policy and expediency; for otherwise an injured party would generally be without remedy. Even the statute of frauds can not, by shutting out parol evidence, be converted into an instrument of fraud or wrong.[2]

§ 859. **Parol Evidence in Suits for a Reformation or Cancellation.**—The foregoing exception embraces all suits brought expressly upon the mistake for the purpose of obtaining affirmative relief from its consequences. It is therefore settled that in the suits, whenever permitted, to reform a written instrument on the ground of a mutual mistake, parol evidence is always admissible to establish the fact of the mistake, and in

[1] Croome v. Lediard, 2 My. & K. 251.

[2] See *per* Lord Westbury, in McCormick v. Grogan, L. R., 4 H. L. 82, 97, quoted *ante*, in § 431; Clarke v. Grant, 14 Ves. 519; Marquis Townshend v. Stangroom, 6 Id. 328, 333, *per* Lord Eldon; Clinan v. Cooke, 1 Sch. & Lef. 22, 39, *per* Lord Redesdale; Murray v. Parker, 19 Beav. 305, 308. As to the effect of surprise see Willan v. Willan, 16 Ves. 72; 19 Id. 590; 2 Dow. 274; Twining v. Morrice, 2 Bro. Ch. 326; Mason v. Armitage, 13 Ves. 25. The following American cases illustrate the exception by which parol evidence may be admitted to vary written instruments on the ground of mistake, in different forms and modes of proceeding. Peterson v. Grover, 20 Me. 363; Bradbury v. White, 4 Greenl. 391; Rogers v. Saunders, 16 Me. 92; Goodell v. Field, 15 Vt. 448; Lawrence v. Staigg, 8 R. I. 256; Quinn v. Roath, 37 Conn. 16; Canterbury Aq. Co. v. Ensworth, 22 Id. 608; Patterson v. Bloomer, 35 Id. 57; Margraff v. Muir, 57 N. Y. 155; Best v. Stow, 2 Sandf. Ch. 298; White v. Williams, 48 Barb. 222; Morganthau v. White, 1 Sweeney, 395; Ryno v. Darby, 20 N. J. Eq. (5 C. E. Green), 231; Conover v. Wardell, 20 Id. (5 Id.) 266; Chamness v. Crutchfield, 2 Ired. Eq. 148; Harrison v. Howard, 1 Id. 407; Perry v. Pearson, 1 Humph. 431; Blanchard v. Moore, 4 J. J. Marsh, 471; Chambers v. Livermore, 15 Mich. 381; Van Ness v. City of Washington, 4 Pet. 232.

In the Cal. Code of Civ. Pro. the general doctrine and the exceptions are formulated as follows (§ 1856): "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings; 2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes wills and deeds, as well as contracts between parties."

what it consisted, and to show how the writing should be corrected in order to conform to the agreement which the parties actually made. Although in such cases there is often some ancillary writing to aid the court, such as a rough draft of the agreement, written instructions, and the like, yet in the absence of these helps, the court *may* grant relief upon the strength of the verbal evidence alone. The same is true in suits brought to rescind and cancel a written agreement on the ground of a mistake by one of the parties, whereby their minds were prevented from meeting upon the same matter, and no agreement was really made; and *a fortiori*, when the ground of the relief is fraud. Parol evidence must be admitted in these classes of cases, in order to a due administration of justice. If the general doctrine of the law, or the statute of frauds was regarded as closing the door against such evidence, the injured party would be without any certain remedy, and fraud and injustice would be successful.[1] The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing, in the language of some judges, "the strongest possible," or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a *mere* preponderance of evidence, but only upon a certainty of the error.[2]

[1] Lady Shelburne v. Lord Inchiquin, 1 Bro. Ch. 338, *per* Lord Thurlow; Calverly v. Williams, 1 Ves. 210; Willan v. Willan, 16 Ves. 72; Davis v. Symonds, 1 Cox, 402; Druiff v. Parker, L. R., 5 Eq. 131, 137; Fowler v. Fowler, 4 De G. & J. 250, 273; Garrard v. Frankel, 30 Beav. 445, 451; Barrow v. Barrow, 18 Id. 529; Malmesbury v. Malmesbury, 31 Id. 407; Murray v. Parker, 19 Id. 305, 308; Scholefield v. Lockwood, 32 Id. 436; Ashurst v. Mill, 7 Hare, 502; Bentley v. Mackay, 31 L. J. Ch. 697; Lackersteen v. Lackersteen, 6 Jur. (N. S.) 1111; Tomlison v. Leigh, 11 Id. 962; Beaumont v. Bramley, Turn. & Russ. 41; Mortimer v. Shortall, 2 Dr. & War. 363; Alexander v. Crosbie, Lloyd & G. 145; Peterson v. Grover, 20 Me. 363; Bellows v. Stone, 14 N. H. 175; Langdon v. Keith, 9 Vt. 299; Chamberlain v. Thompson, 10 Conn. 243; Wooden v. Haviland, 18 Id. 101; Many v. Beekman Iron Co., 9 Paige, 188; Firmstone v. De Camp, 17 N. J. Eq. (2 C. E. Green), 317; Waldron v. Letson, 2 McCart. 126; Blair v. McDonnell, 1 Halst. Ch. 327; Gump's Appeal, 65 Pa. St. (15 P. F. Sm.) 476; Chew v. Gillespie, 56 Id. (6 Id.) 308; Lauchner v. Rex, 8 Harris, 464; Gower v. Sterner, 2 Whart. 75; Baynard v. Norris, 5 Gill, 468; Newcomer v. Kline, 11 Gill & J. 457; Irick v. Fulton, 3 Gratt. 193; Keyton v. Brawford, 5 Id. 39; Larkins v. Biddle, 21 Ala. 252; Hale v. Stone, 14 Id. 803; Lauderdale v. Hallock, 7 Sm. & Mar. 622; Wurzburger v. Meric, 20 La. An. 415; Mattingly v. Speak, 4 Bush, 316; Graves v. Mattingly, 6 Id. 361; McCann v. Letcher, 8 B. Mon. 320; McCloskey v. McCormick, 44 Ill. 336; Mills v. Lockwood, 42 Id. 111; Cleary v. Babcock, 41 Id. 271; Shively v. Welch, 2 Org. 288; Bradford v. Union B'k, 13 How. (U. S.) 57, 66; and see cases in next note.

[2] Henkle v. Royal Exch. Co., 1 Ves. Sen. 317; Pitcairn v. Ogbourne, 2 Id. 375, 379; Willan v. Willan, 16 Ves.

§ 860. **Parol Evidence in Defense in Suits for a Specific Performance.**—The second class of cases embraces those in which parol evidence of mistake is offered defensively. The equitable remedy of the specific enforcement of contracts, even when they are valid and binding at law, is not a matter of course; it is so completely governed by equitable considerations, that it is sometimes, though improperly, called discretionary; it is never granted unless it is entirely in accordance with equity and good conscience. It is therefore a well-settled rule that in suits for the specific enforcement of agreements even when written, the defendant may by means of parol evidence show that through the mistake of both or either of the parties, the writing does not express the real agreement; or that the agreement itself was entered into through a mistake as to its subject-matter, or as to its terms. In short, a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood. What is thus true of mistake, is equally true of a defense based upon fraud or surprise.[1] Wherever the de-

72; Marquis Townshend v. Stangroom, 6 Id. 328, 333; Fowler v. Fowler, 4 De G. & J. 250, 265; Walker v. Armstrong, 8 De G. M. & G. 531; Bold v. Hutchinson, 5 Id. 558; Bentley v. Mackay, 4 De G. F. & J. 279; 31 L. J. Ch. 709; Harris v. Pepperell, L. R., 5 Eq. 1; Earl of Bradford v. Earl of Romney, 30 Beav. 431; Garrard v. Frankel, 30 Id. 445; Eaton v. Bennett, 34 Id. 196; Lloyd v. Cocker, 19 Id. 140; Rooke v. Lord Kensington, 2 K. & J. 753; Sells v. Sells, 1 Dr. & Sm. 42; Mortimer v. Shortall, 2 Dr. & War. 363, 372, 374; Beaumont v. Bramley, T. & R. 41, 50; Marquis of Breadalbane v. Marquis of Chandos, 2 My. & Cr. 711, 740; U. S. v. Munroe, 5 Mason, 572; Andrews v. Essex Ins. Co., 3 Id. 6; Tucker v. Madden, 44 Me. 206; Farley v. Bryant, 32 Me. 474; Brown v. Lamphear, 35 Vt. 252; Lyman v. Little, 15 Id. 576; Preston v. Whitcomb, 17 Id. 183; Stockbridge Iron Co. v. Hudson R. Iron Co., 102 Mass. 45; Sawyer v. Hovey, 3 Allen, 331; Andrew v. Spurr, 8 Id. 412; Canedy v. Marcy, 13 Gray, 373; Nevins v. Dunlap, 33 N. Y. 676; Mead v. Westchester Ins. Co., 64 Id. 453; White v. Williams, 48 Barb. 222; Smith v. Mackin, 4 Lans. 41; Lyman v. U. S. Ins. Co., 2 Johns. Ch. 630; 17 Johns. 373; Conover v. Wardell, 22 N. J. Eq. (7 C. E. Green), 492; Burgin v. Giberson, 26 N. J. Eq. 72; Green v. Morris, 1 Beasl. 165, 170; Durant v. Bacot, 2 Id. 201; 2 McCart. 411; Hall v. Clagett, 2 Md. Ch. 151; Philpott v. Elliott, 4 Id. 273; Showman v. Miller, 6 Md. 479; Brantley v. West, 27 Ala. 542; Mosby v. Wall, 23 Miss. 81; Tesson v. Atlantic Ins. Co., 40 Mo. 33, 36; Beebe v. Young, 14 Mich. 136; Shay v. Pettes, 35 Ill. 360; Edmonds' App. 59 Pa. St. 220; Potter v. Potter, 27 Ohio St. 84; Heavenridge v. Mondy, 49 Ind. 434; Miner v. Hess, 47 Ill. 170; Newton v. Holley, 6 Wisc. 564; State v. Frank, 51 Mo. 98; Lestrade v. Barth, 19 Cal. 660, 675; Hathaway v. Brady, 23 Id. 122; Shively v. Welch, 2 Oreg. 288. In Stockbridge etc. Co. v. Hudson R. Co., *supra*, Chapman, J., said: "The ordinary rule of evidence in civil actions, that the fact must be proved by a preponderance of evidence, does not apply to such a case as this. The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt."

[1] Joynes v. Statham, 3 Atk. 388; Garrard v. Grinling, 2 Sw. 244; Lord

fendant's mistake was, either intentionally or not, induced or made probable or even possible, by the acts or omissions of the plaintiff, then, on the plainest principles of justice, such error prevents a specific enforcement of the agreement.[1] Such co-operation by the plaintiff, however, is not at all essential. A mistake which is entirely the defendant's own, or that of his agent, and for which the plaintiff is not directly or indirectly responsible, may be proved in defense and may defeat a specific performance. This is indeed the very essence of the equitable theory concerning the nature and effect of mistake.[2] A mistake thus set

Gordon v. Marq. of Hertford, 2 Madd. 106; Clarke v. Grant, 14 Ves. 519; Winch v. Winchester, 1 V. & B. 375; Manser v. Back, 6 Hare, 443; Wood v. Scarth, 2 K. & J. 33; Alvanley v. Kinnaird, 2 Macn. & G. 1; Watson v. Marston, 4 De G. M. & G. 230; Falcke v. Gray, 4 Drew, 651; Barnard v. Cave, 26 Beav. 253; Webster v. Cecil, 30 Id. 62; Bradbury v. White, 4 Greenl. 391; Quinn v. Roath, 37 Conn. 16; Best v. Stow, 2 Sandf. Ch. 298; Coles v. Bowne, 10 Paige, 526; Ely v. Perrine, 1 Green's Ch. 396; Ryno v. Darby, 20 N. J. Eq. (5 C. E. Green), 231; Towner v. Lucas, 13 Gratt. 705, 714; Chambers v. Livermore, 15 Mich. 381; Cathcart v. Robinson, 5 Pet. 263.

[1] Denny v. Hancock, L. R., 6 Ch. 1; Baskcomb v. Beckwith, Id.; 8 Eq. 100; Swaisland v. Dearsley, 29 Beav. 430; Webster v. Cecil, 30 Id. 62; Mason v. Armitage, 13 Ves. 25; Clowes v. Higginson, 1 V. & B. 524; 15 Ves. 516; Pym v. Blackburn, 3 Ves. 34; and see Doggett v. Emerson, 3 Story, 700; Rider v. Powell, 28 N. Y. 310; Matthews v. Terwilliger, 3 Barb. 50.

[2] Ball v. Storie, 1 S. & S. 210; Malins v. Freeman, 2 Keen, 25; Manser v. Back, 6 Hare, 443; Leslie v. Tompson, 9 Id. 268; Alvanley v. Kinnaird, 2 Macn. & G. 1, 7; Helsham v. Langley, 1 Y. & C. 175; Neap v. Abbott, C. P. Coop. 333; Howell v. George, 1 Madd. 1; Wood v. Scarth, 2 K. & J. 33; Baxendale v. Seale, 19 Beav. 601; Webster v. Cecil, 30 Id. 62; Western R. R. v. Babcock, 6 Metc. 346; Park v. Johnson, 4 Allen, 259; Post v. Leet, 8 Paige, 337; see, however, Mortimer v. Pritchard, 1 Bailey Eq. 505.

In applying these rules of the text, it may be laid down as a general proposition, that wherever in the description of the subject-matter or in the terms and stipulations, a written agreement is ambiguous, so that the defendant may reasonably have been mistaken as to the subject-matter or terms; or is susceptible of different constructions, so that upon one construction it would have an effect which the defendant may be reasonably supposed not to have contemplated or intended; or so that the defendant may have reasonably put a different construction upon it from that which was understood by the plaintiff; in either of these cases a specific performance will be denied at the instance of the defendant, on the ground that it is inequitable to enforce the apparent agreement, when he has shown that there was no real meeting of minds, no common assent upon the same matters. Calverly v. Williams, 1 Ves. 210; Jenkinson v. Pepys, cited 15 Id. 521; 1 V. & B. 528; Clowes v. Higginson, Id. 524; Harnett v. Yielding, 2 Sch. & Lef. 549; Watson v. Marston, 4 De G. M. & G. 230; Parker v. Taswell, 2 De G. & J. 559; Callaghan v. Callaghan, 8 Cl. & Fin. 374; Wycombe Ry. v. Donnington Hospital, L. R., 1 Ch. 268; Neap v. Abbott, C. P. Coop. 333; Wood v. Scarth, 2 K. & J. 33; Baxendale v. Seale, 19 Beav. 601; Swaisland v. Dearsley, 29 Id. 430; Webster v. Cecil, 30 Id. 62; Hood v. Oglander, 34 Id. 513; Manser v. Back, 6 Hare, 443. An attempt has been made in a few cases to limit the operation of this doctrine. Thus, in Clowes v. Higginson, 1 V. & B. 524, Sir Thos. Plumer was of opinion that the admission of defendant's parol evidence of mistake, surprise, or fraud should be restricted to matters collateral to and independent of the written contract itself. He disputed the doctrine which permits the defendant to contradict the terms themselves of a written contract for the purpose of defeating

up by the defendant is not merely a ground of defense, of dismissing the suit. If the plaintiff alleges a written agreement, and demands its specific performance, and the defendant sets up in his answer a verbal provision, or stipulation, or variation omitted by mistake, surprise, or fraud, and submits to an enforcement of the contract *as thus* varied, and clearly proves by his parol evidence that the written contract modified or varied in the manner alleged by him, constitutes the original and true agreement made by the parties, the court may not only reject the plaintiff's version, but may adopt that of the defendant, and may decree a specific performance of the agreement with the parol variation upon the mere allegations of his answer, without requiring a cross-bill. The court will either decree a specific execution of the contract thus varied by the defendant, or else, if the plaintiff refuses to accept such relief, will dismiss the suit.[1] Under the old chancery practice, the action of the court in such cases seemed to have been discretionary. Under the reformed procedure, which permits affirmative relief, either legal or equitable, to be obtained by defendants through a counter-claim, such a decree, under proper pleadings, is doubtless a matter of course and of right. Even where there has been *no* mistake, surprise, or fraud, if, in such a suit, the defendant alleges and proves an *additional* parol provision or stipulation agreed upon by the parties, the court will decree a specific performance of the written contract with this verbal provision incorporated into it, or else will dismiss the suit entirely.[2] It is not every mistake

a specific performance, but conceded that parol evidence was admissible to show mistake, fraud, or surprise in something collateral to the contract. See, also, Price v. Ley, 4 Giff. 235; 32 L. J. Ch. (N. S.) 530. Notwithstanding this attempt to limit the doctrine, it is very clear that parol evidence of mistake, surprise, or fraud is admissible *in defense* as well where it contradicts the very terms themselves of the written agreement, as where it contradicts or modifies something collateral to the contract. Ramsbottom v. Gosdon, 1 V. & B. 165; Winch v. Winchester, Id. 375; Marquis of Townshend v. Stangroom, 6 Ves. 328; and see cases cited in former part of this note.

[1] Ramsbottom v. Gosdon, 1 V. & B. 165; Winch v. Winchester, 1 Id. 375; Joynes v. Statham, 3 Atk. 388; Fife v. Clayton, 13 Ves. 546; Clarke v. Grant, 14 Ves. 519; Gwynn v. Lethbridge, 14 Id. 585; Martin v. Pycroft, 2 De G. M. & G. 785; London etc. Ry. v. Winter, Cr. & Ph. 57; Price v. Ley, 4 Giff. 235; Manser v. Back, 6 Hare, 443; Wood v. Scarth, 2 K. & J. 33; Barnard v. Cave, 26 Beav. 253; Webster v. Cecil, 30 Id. 62; Vouillon v. States, 2 Jur. (N. S.) 845; Bradford v. Union B'k, 13 How. (U. S.) 57; Quinn v. Roath, 37 Conn. 16; Patterson v. Bloomer, 35 Id. 57; Wells v. Cruger, 5 Paige, 164; Best v. Stow, 2 Sandf. Ch. 298; Ferussac v. Thorn, 1 Barb. 42; Bradbury v. White, 4 Green's Ch. 391; Ryno v. Darby, 20 N. J. Eq. (5 C. E. Green), 231; McComas v. Easley, 21 Gratt. 23; Arnold v. Arnold, 2 Dev. Eq. 467; Huntington v. Rogers, 9 Ohio St. 511, 516; Chambers v. Livermore, 15 Mich. 381; Murphy v. Rooney, 45 Cal. 78.

[2] Martin v. Pycroft, 2 De G. M. & G. 785 (a very instructive case); Leslie v. Tompson, 9 Hare, 268; Barnard v. Cave, 26 Beav. 253; and see Croome

which will defeat the enforcement of an agreement. The error must be material, and must possess all of the elements heretofore described as requisite to the existence of the equitable jurisdiction.[1]

§ 861. **Parol Evidence of Mistake on the Plaintiff's Part in Suits for a Specific Performance; English Rule.**— We come in the third place to the question as to parol evidence of mistake on the part of the plaintiff in suits brought upon written agreements seeking to obtain their specific enforcement. It has been shown that parol evidence of the mistake may be used by the plaintiff in suits brought directly upon it and seeking the remedy of a reformation or a cancellation in order to be relieved from its consequences; and also, that in suits on a written contract, the defendant may resort to parol evidence of a mistake by way of defense, and even that the court may decree a performance of the contract *as thus varied by means of his evidence.* The question now presented is, whether in suits of the same nature for the enforcement of a written agreement, the plaintiff, in addition to his averment of the written contract, may allege a mistake, surprise, or fraud, and may by means of parol evidence establish the verbal modification in the terms of the contract which would result from such error or fraud, and may obtain in the same suit a specific performance of the agreement so modified or varied. The rule is well established in England that this can not be done, unless there has been a part performance of the parol variation.[2]

v. Lediard, 2 My. & K. 251, in which the subject of parol variation is fully discussed. The rule of the text will not be applied where the contract has been to a great extent performed, and the parties can not be restored to their original position. Vouillon v. States, 2 Jur. (N. S.) 845.

[1] Thus, an inadvertent omission to propose an intended provision or stipulation as a part of the agreement, is not, Parker v. Taswell, 2 De G. & J. 559, but see Broughton v. Hutt, 3 Id. 501; nor is a mistake as to the purpose for which the property referred to in the contract, is to be used. Mildmay v. Hungerford, 2 Vern. 243.

[2] The leading case is Woollam v. Hearn, 7 Ves. 211; 2 Eq. Lead. Cas. and notes, 920 (4th Am. ed.); Earl Darnley v. London etc. Ry., L. R., 2 H. L. 43; Wilson v. Wilson, 5 H. L. Cas. 40, 65, *per* Lord St. Leonards; Rich v. Jackson, 4 Bro. Ch. 514; 6 Ves. 334, n.; Higginson v. Clowes, 15 Ves. 516, 523; Winch v. Winchester, 1 V. & B. 375, 378; Manser v. Back, 6 Hare, 443, 447; Squire v. Campbell, 1 My. & Cr. 459, 480; London etc. Ry. v. Winter, Cr. & Ph. 57, 61; Emmet v. Dewhurst, 3 Macn. & G. 587; Att'y-gen. v. Sitwell, 1 Y. & C. Ex. 559; Clinan v. Cooke, 1 Sch. & Lef. 22, 38, 39; Davies v. Fitton, 2 Dr. & War. 225, 233. There are *dicta* suggesting a contrary view by Lord Hardwicke in Walker v. Walker, 2 Atk. 98, 100; 6 Ves. 335, n.; and in Joynes v. Statham, 3 Atk. 388; by Lord Thurlow, in Pember v. Mathers, 1 Bro. Ch. 52; and by Lord Eldon in Marquis Townshend v. Stangroom, 6 Ves. 328, 339; and see, also, Harrison v. Gardner, 2 Madd. 198; Clarke v. Grant, 14 Ves. 519, 524, *per* Sir Wm. Grant; Clifford v. Turrell, 1 Y. & C. Ch. 138, *per* V. C. Knight Bruce. As to enforcing the performance of a written contract

The reason originally assigned for this rule was, that the admission of parol evidence as the foundation for final relief in such suits, would be a violation of the statute of frauds. If this reasoning has any force, it is difficult to see why it does not equally forbid the enforcement of written contracts as modified by parol evidence at the instance of defendants; or why it does not, in fact, strike at the very foundation of the doctrine of reforming written agreements by means of parol evidence.

§ 862. **Same: American Rule; Evidence Admissible.**—The American courts have pursued a more simple and enlightened course of adjudication. The doctrine is well settled in the United States, that where the mistake or fraud in a written contract is such as admits the equitable remedy of reformation, parol evidence may be resorted to by the plaintiff in suits brought for a specific performance. The plaintiff in such a suit may allege and by parol evidence prove the mistake or fraud, and the modification in the written agreement made necessary thereby, and may obtain a decree for the specific enforcement of the agreement thus varied and corrected.[1] As in suits for a

with a parol modification at the instance of and proved by the defendant, see Martin v. Pycroft, 2 De G. M. & G. 785; Robinson v. Page, 3 Russ. 114, and cases in note under the last paragraph. This English doctrine, although established by such an array of authority, is open to the following observations: (1) When the alleged mistake, and *a fortiori* the fraud, is committed by the plaintiff himself, it would be manifestly unjust that he should be allowed to correct his own error, or obviate the effects of his own deceit, and obtain the affirmative remedy of a specific execution of the contract as thus amended. In its application to such a case, the doctrine rests upon the sure foundations of equity, and prevails in the United States as well as in England. (2) But when the mistake is common, or the fraud is committed by the other party, so that the contract is one which may be reformed, there is certainly no greater injustice in permitting such correction, as a preliminary to an enforcement, to be made on the demand of the plaintiff, and as the result of parol evidence introduced by him, than in allowing it to be made on the allegations, parol proofs, and contention of the defendant. And when we consider that the plaintiff is able, by means of parol evidence, to obtain a reformation of the written contract, and that he can in a second suit compel the specific performance of the agreement as thus corrected, the doctrine of the text seems to rest upon no more solid foundation than mere verbal logic.

[1] The leading case is Keisselbrack v. Livingston, 4 Johns. Ch. 144, 148. Chan. Kent placed the decision broadly and squarely upon this doctrine, and said concerning it as follows: "Why should not the party aggrieved by a mistake have relief as well where he is plaintiff as where he is defendant? It can not make any difference in the reasonableness and justice of the remedy, whether the mistake were to the prejudice of the one party or the other. If the court be a competent jurisdiction to correct such mistakes—and that is a point understood and settled—the agreement when corrected and made to speak the real sense of the parties ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection, when made accurate under a decree of the court, as when made accurate by the act of the parties." The doctrine is either directly decided or recognized by the following cases: Bellows v. Stone, 14 N. H. 175; Smith v. Greeley,

reformation alone, the evidence must be of the clearest and most convincing nature; the burden of proof is on the plaintiff, and he must prove his case beyond a reasonable doubt.[1] It is not sufficient merely to prove a mistake which might be ground for a rescission. The plaintiff must establish a mistake of such a character as entitles him to a reformation, and such circumstances as render a reformation possible.[2] In those states which have adopted the reformed procedure this doctrine is clearly established and its operation enlarged. In one civil action the plaintiff may not only unite and obtain both the remedy of reformation and the equitable remedy of specific performance, but also the remedy of reformation and the legal remedy of a pecuniary judgment for debt or damages for the breach of the contract as corrected, or the legal remedy of a recovery of specific property.[3] Also the defendant, by means of a counterclaim, may obtain against the plaintiff the same union of affirmative equitable or equitable and legal reliefs.[4]

14 Id. 378; Tilton v. Tilton, 9 Id. 385; Craig v. Kittredge, 3 Fost. 231; Beardsley v. Knight, 10 Vt. 185; Glass v. Hulbert, 102 Mass. 24, 41; Metcalf v. Putnam, 9 Allen, 97; Quinn v. Roath, 37 Conn. 16; Wooden v. Haviland, 18 Id. 101; Chamberlain v. Thompson, 10 Id. 243; Gillespie v. Moon, 2 Johns. Ch. 585; Lyman v. Un. Ins. Co., 17 Johns. 373; Rosevelt v. Fulton, 2 Cow. 129; Coles v. Bowne, 10 Paige, 526, 535; Gouverneur v. Titus, 1 Edw. Ch. 477; 6 Paige, 347; Hyde v. Tanner, 1 Barb. 75; Gooding v. McAlister, 9 How. Pr. 123; Smith v. Allen, Saxt. (N. J.) 43; Hendrickson v. Ivins, Saxt. 562; Christ v. Diffenbach, 1 Serg. & R. 464; Susquehanna Ins. Co. v. Perrine, 7 W. & S. 348; Gower v. Sterner, 2 Whart. 75; Bowman v. Bittenbender, 4 Watts, 290; Clark v. Partridge, 2 Barr. 13; 4 Id. 166; Wesley v. Thomas, 6 Har. & J. 24; Moale v. Buchanan, 11 Gill & J. 314, 325; Coutt v. Craig, 2 Hen. & Mun. 618; Newsom v. Bufferlow, 1 Dev. Eq. 383; Brady v. Parker, 4 Ired. Eq. 430; Clopton v. Martin, 11 Ala. 187; Harris v. Columbiana Ins. Co., 18 Ohio, 116; Webster v. Harris, 16 Id. 490; Worley v. Tuggle, 4 Bush, 168, 173; Shelby v. Smith, 2 A. K. Marsh. 504; Bailey v. Bailey, 8 Humph. 230; Leitensdorfer v. Delphy, 15 Mo. 160; Murphy v. Rooney, 45 Cal. 78; Murray v. Dake, 46 Id. 644.

[1] Nevins v. Dunlap, 33 N. Y. 676; Lyman v. U. Ins. Co., 2 Johns. Ch. 630; 17 Johns. 373; Harris v. Reece, 5 Gilm. 212; Beard v. Linthicum, 1 Md. Ch. 345; Brady v. Parker, 4 Ired. Eq. 430; Harrison v. Howard, 1 Id. 407; Hunter v. Bilyeu, 30 Ill. 228, 246; Selby v. Geines, 12 Id. 69; Bailey v. Bailey, 8 Humph. 230; and see *ante*, § 859 and cases in note.

[2] Lyman v. U. Ins. Co., 2 Johns. Ch. 630; Keisselbrack v. Livingston, 4 Id. 144; Rider v. Powell, 28 N. Y. 310; Mathews v. Terwilliger, 3 Barb. 50; Hall v. Clagett, 2 Md. Ch. 151, 153; Philpott v. Elliott, 4 Id. 273; Durant v. Bacot, 2 McCarter, 411; Beebe v. Young, 14 Mich. 136; Tesson v. Atlantic M. Ins. Co., 40 Mo. 33, 36; Fowler v. Fowler, 4 De G. & J. 250, 265.

[3] Pomeroy on Remedies, §§ 78–85; reforming and a pecuniary judgment on the instrument as reformed, Bidwell v. Astor Ins. Co., 16 N. Y. 263; Cone v. Niagara Ins. Co., 60 Id. 619; 3 T. & C. 33; N. Y. Ice Co. v. N. W. Ins. Co., 23 N. Y. 357, 359; Welles v. Yates, 44 Id. 525; Caswell v. West, 3 T. & C. 383. Reformation and other specific relief, such as recovery of land, Lattin v. McCarty, 41 N. Y. 107; Phillips v. Gorham, 17 Id. 270; Laub v. Buckmiller, 17 Id. 620; Henderson v. Dickey, 50 Mo. 161, 165; and see on this subject generally, Gray v. Dougherty, 25 Cal. 266; Walker v. Sedgwick, 8 Id. 398; Guernsey v. Am. Ins. Co., 17 Minn. 104, 108; Montgomery v. McEwen, 7 Id. 351.

[4] Pomeroy on Remedies, §§ 91–97;

§ 863. **Evidence of a Parol Variation Which has been Part Performed.**—There is one particular case with respect to which the English and American courts are agreed—the part performance by the plaintiff of the parol provision which he alleges in variation of the written agreement. It is the settled rule, both in England and in this country, that, in suits for a specific performance, the plaintiff may allege and prove a verbal addition or variation of the written contract, and that this additional verbal stipulation has been part performed by him, and may then obtain a decree for the specific enforcement of the entire agreement as thus modified.[1] There are two conditions of fact to which this rule applies: (1) The verbal modification may be contemporaneous with and a part of the original agreement.[2] (2) It may be a subsequent alteration of or addition to the original written agreement.[3] The rule applies alike to each of these two cases; but in both the part performance must be of the verbal stipulation, and must conform to all requisites as settled with respect to the part performance of any verbal agreement.[4]

§ 864. **Effect of the Statute of Frauds upon the Use of Parol Evidence.**—I shall conclude this branch of the subject with an examination, in more general terms, of the doctrine concerning the admission of parol evidence to vary the terms of written instruments which are embraced within the statute of frauds; the theory upon which the doctrine rests, the extent to which such evidence is admissible, and the limits upon the doctrine which have been asserted by some decisions. The discussion embraces both the use of parol evidence in suits brought merely for the reformation of such written instruments; and also its use where the plaintiff seeks, in one suit, to correct a written instrument by means of a verbal variation, and to specifically enforce it as corrected; the same fundamental principle

Murphy v. Rooney, 45 Cal. 78; Guedici v. Boots, 42 Id. 452, 456; Talbert v. Singleton, 42 Id. 390; Hoppough v. Struble, 60 N. Y. 430; Haire v. Baker, 5 Id. 357; Crary v. Goodman, 12 Id. 266, 268; Bartlett v. Judd, 21 Id. 200, 203; Cavalli v. Allen, 57 Id. 508; Petty v. Malier, 15 B. Mon. 591, 604; Ingles v. Patterson, 36 Wisc. 373; Onson v. Cown, 22 Id. 329.

[1] Anon., 5 Vin. Abr. 522, pl. 38; Legal v. Miller, 2 Ves. Sen. 299; Pitcairn v. Ogbourne, 2 Id. 375; Price v. Dyer, 17 Ves. 356; Gilroy v. Alis, 22 Iowa, 174; and cases in the two following notes.

[2] As an illustration: The real agreement was for the sale of two lots; the writing only set forth a contract for the sale of one; the plaintiff proves by parol evidence the true contract, and also a sufficient part performance with respect to the second lot; a specific performance of the whole is granted. Moale v. Buchanan, 11 Gill & J. 314; Parkhurst v. Cortlandt, 1 Johns. Ch. 273; 14 Johns. 15; and see Tilton v. Tilton, 9 N. H. 385; Glass v. Hulbert, 102 Mass. 24, 43.

[3] O'Connor v. Spaight, 1 Sch. & Lef. 305; Devling v. Little, 2 Casey, 502.

[4] Cases in the two preceding notes; Glass v. Hulbert, 102 Mass. 24, 28, *per* Wells, J.; Allen's Estate, 1 Watts & S. 383; Broughton v. Coffer, 18 Gratt. 184.

underlies both of these classes. A distinct conflict of opinion exists among the American decisions with respect to the extent of the general doctrine and the limitations upon its operation; and the question is one of so much practical importance that it demands a careful examination. I shall state the two opposing positions, and the grounds on which they are maintained, as clearly and accurately as may be possible; and shall endeavor to show which of the two accords with principle, and is sustained by authority. It is, of course, assumed that the variation in the writing, which is to be established by parol evidence, arose from mistake, surprise, or fraud.

§ 865. **Two Classes of Cases in Which the Use of Parol Evidence may be Affected by the Statute.**—In contracts required by the statute of frauds to be in writing, all possible errors requiring a verbal variation, whether arising from mistake, surprise, or fraud, may be reduced to two general classes: (1) By means of the error the contract may include within its terms certain subject-matters—as, for example, lands—which were not intended by the parties to come within its operation; in which case the parol evidence will show that such subject-matters should be omitted; and the relief demanded will be a correction which shall exclude them, and confine the operation of the agreement to the remaining subject-matters mentioned in it; and to which alone it was intended by the parties to apply. (2) By means of the error the contract may omit certain subject-matters—as lands—which were intended by the parties to come within its operation; and in this case the parol evidence will show that such subject-matter should be included; and the relief demanded will be a modification of the writing so that it shall embrace them, and shall thus extend its operation to particular subject-matters not mentioned in it, but to which it was originally intended to apply. So far as the statute of frauds can affect the parol variation of written instruments, it is obvious that these two classes describe all possible cases which can arise. Now it has been asserted—and I merely *state* the position at present without inquiring into its correctness—that a reformation and enforcement based upon parol evidence in the first of these classes, does not conflict with the statute of frauds, since the relief does not *make* a parol contract, but simply narrows a written one already made. On the other hand, as it is asserted, the same relief in the second class does directly conflict with the statute, since it is a virtual making of a parol contract in relation to land or other subject-mat-

ter specified in the statute. In short, it is argued, the remedy in the latter instance is a parol extension of a written contract, so that it shall embrace a subject-matter not otherwise within its scope; in the former instance it is the withdrawal, by parol evidence, of a portion of the subject-matter from the scope of a written contract which is left in full force as to the remaining portion which had been embraced within it from the beginning; one is an affirmative process of making a contract; the other is merely a negative process of limiting a contract already made. The conflict of decision before mentioned turns upon these two classes. According to the interpretation of the general doctrine maintained by one group of decisions, the admission of parol evidence is confined to cases falling within the first class; according to the other view, the evidence is admissible alike in cases belonging to both classes.

§ 866. **General Doctrine that Parol Evidence of Mistake or of Fraud is Admissible in both Classes of Cases.**— The doctrine in all its breadth and force is maintained by courts and jurists of the highest ability and authority, which hold that whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variation consists in limiting the scope of the contract, or in enlarging and extending it so as to embrace land or other subject-matter which had been omitted through the fraud or mistake, and that he may then obtain a specific performance of the contract thus varied; and such relief may be granted although the agreement is one which by the statute of frauds is required to be in writing.[1] This view, in my opinion, is not only supported by the overwhelming preponderance of judicial authority, but is in complete accordance with the fundamental principles of equity jurisprudence. Indeed, the other theory, as will more fully appear in the sequel, has no *necessary* connection with specific performance; if adopted and consistently carried out, it would necessarily restrict within narrow bounds the most salutary equitable remedy of reformation.

[1] Keisselbrack v. Livingston, 4 Johns. Ch. 144; Gillespie v. Moon, 2 Id. 585; Phyfe v. Wardell, 2 Edws. Ch. 47; Coles v. Bown, 10 Paige, 526, 535; Hendrickson v. Ivins, Saxton (N. J.) 562; Workman v. Guthrie, 5 Casey, 495; Raffensberger v. Callison, 4 Id. 426; Tyson v. Passmore, 2 Barr. 122; Gower v. Sterner, 2 Whart. 75; Philpott v. Elliott, 4 Md. Ch. 273; Tilton v. Tilton, 9 N. H. 385; Murphy v. Rooney, 45 Cal. 78; Quinn v. Roath, 37 Conn. 16; Monro v. Taylor, 3 Macn. & G. 713, 718; Leuty v. Hillas, 2 De G. & J. 110, 120; Beardsley v. Duntley, 69 N. Y. 577.

The same broad view of the doctrine is clearly illustrated in the treatment of executed contracts or conveyances of land. It is settled by the great preponderance of authority, that a deed of land may be thus corrected by enlarging its scope, extending its operation to other subject-matter, supplying portions of land which had been omitted, making the estates conveyed more comprehensive—as changing a life estate into a fee —and the like; and by enforcing the instrument thus varied against the grantor. If the doctrine can be thus applied to deeds which have actually conveyed the title, then *a fortiori* may it be applied to mere executory contracts which do not disturb the legal title.[1] No such relief, however, can be granted, either when the contract is executory or executed, and no parol evidence can be used to modify the terms of a written instrument, and most emphatically when that instrument is required by the statute of frauds to be in writing, except upon the occasion of mistake, surprise, or fraud; one or the other of these incidents must be alleged and proved before a resort can be had to parol evidence in such cases. This is certainly the general rule, and the exceptions to it are more apparent than real.[2]

§ 867. **Glass v. Hurlburt: Examination of Proposed Limitations on this General Doctrine.**—The courts of some states have confined the operation of the general doctrine to the first of the two classes described in a preceding paragraph. They have refused to apply the doctrine of a parol variation on behalf of the plaintiff to written instruments within the statute of frauds, when the modification would enlarge the scope of the instrument so that it should include subject-matter not embraced within it as it stands, or would increase the estate, or would otherwise cause it to operate upon interests which were not originally contained within its terms.[3] The grounds upon

[1] Monro v. Taylor, 3 Macn. & G. 718; Leuty v. Hillas, 2 De G. & J. 110, 120; Craig v. Kittredge, 3 Fost. 231; Smith v. Greeley, 14 N. H. 378; Tilton v. Tilton, 9 Id. 385; Blodgett v. Hobart, 18 Vt. 414; Chamberlain v. Thompson, 10 Conn. 243; Gouverneur v. Titus, 1 Edw. Ch. 477; 6 Paige, 347; Wiswall v. Hall, 3 Paige, 313; De Peyster v. Hasbrouck, 11 N. Y. 582; Hendrickson v. Ivins, Saxt. 562; Tyson v. Passmore, 2 Barr. 122; Flagler v. Pleiss, 3 Rawle, 345; Moale v. Buchanan, 11 Gill & J. 314; Worley v. Tuggle, 4 Bush, 168, 182; Provost v. Rebman, 21 Iowa, 419; Wright v. McCormick, 22 Id. 545; Hunter v. Bilyeu, 30 Ill. 228; Murray v. Dake, 46 Cal. 644.

[2] Lee v. Kirby, 104 Mass. 420; Blakeslee v. Blakeslee, 10 Harris, 237. The rule prevailing in several states, which allows parol evidence to show that a deed absolute on its face is really a mortgage, even when there was no mistake or fraud in its execution, might be regarded as an exception, but is not so treated by the courts which have adopted it; it is rested by them upon entirely different principles.

[3] The case in which this restrictive view is set forth in the most elaborate and distinct manner, and is maintained

which this conclusion is based are briefly as follows: The statute of frauds peremptorily requires that every contract creating, or transferring, or otherwise dealing with an interest in land, must be in writing; and that while the limitation or restriction

with the greatest display of reasoning, is Glass v. Hulbert, 102 Mass. 24. The practical importance of the question justifies a careful examination of this noted decision. One of two adjoining lots belonging to the same person was bought in reliance upon the vendor's false and fraudulent representations that it included a certain sixteen acres, whereas these acres formed a part of the other lot. On discovering the fraud the purchaser brought the suit praying that the vendor might be compelled to convey the lot really intended. This remedy the court refused, holding that the vendee must be confined to a rescission and a legal action for damages. The following extracts from the opinion by Wells, J., will show the theory maintained by the Massachusetts court. Mr. Justice Wells, after criticising the opinion of Chan. Kent in the leading case of Gillespie v. Moon, and claiming that much of what the chancellor there said concerning the extent and operation of the general doctrine, was a mere *dictum*, not warranted by the facts nor necessary to the decision, proceeds: "The *principle* which was maintained by Chan. Kent in Gillespie v. Moon, was that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract, as well as to a defendant resisting its enforcement. That proposition must be considered as fully established. It is quite another proposition to enlarge the subject-matter of the contract, or to add a new term to the writing, by parol evidence and enforce it. No such proposition was presented by the case of Gillespie v. Moon, and it does not sustain the right to such relief against the statute of frauds. * * * * When the proposed reformation of an instrument involves the specific performance of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of a right to set up that defense. (Jordan v. Sawkins, 1 Ves. 402; Osborn v. Phelps, 19 Conn. 63; Clinan v. Cooke, 1 Sch. & Lef. 22.) The fact that the omission or defect in the writing, by reason of which it failed to convey the land, or to express the obligation which it is sought to make it convey or express, was occasioned by mistake or by deceit and fraud, will not alone constitute such an estoppel. There must concur also some change in the condition or situation of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party either express or implied, for which he would be left without redress if the agreement were to be defeated. The principle on which courts of equity rectify an instrument so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission by mutual mistake in the reduction of the agreement to writing, is, as we understand it, that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing; and upon clear proof of its terms the court compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement as actually intended to be made shall be truly expressed and executed. (Hunt v. Rousmaniere, 1 Pet. 1; Oliver v. Mut. Ins. Co., 2 Curtis C. C. 277.) But when the omitted term or obligation is within the statute of frauds, *there is no valid agreement which the court is authorized to enforce outside of the writing.* In such a case relief may be had *against* the enforcement of the contract as written contrary to the purport and intent of the real agreement of the

of a written agreement, so that it shall not include all the subject-matter originally within its scope, does not conflict with the statute, a reformation or enforcement based upon parol evidence, by which the contract is made to operate upon new and distinct subject-matter, estates, or interests, is a direct violation of the legislative mandate, and a gross usurpation of power by the courts, and can not therefore be permitted. With regard to the character of these decisions as correct representations of the equitable doctrine, and to their effect as binding authority, it would perhaps be enough to say that, at the time when they were made, the courts of Massachusetts and of Maine, able and learned as they were, possessed only a very narrow and partial equitable jurisdiction conferred entirely by statutes; and it was the very central position of their local system, repeatedly affirmed in the most positive manner, that they would

parties. Such relief may be given as well upon the suit of a plaintiff seeking to have a written contract or some of its terms set aside, annulled, or restricted, as to a defendant resisting its specific performance. (Gillespie v. Moon; Keisselbrack v. Livingston.) Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the statute of frauds. That statute forbids the enforcement of certain kinds of agreement without writing; but it does not forbid the defeat or restriction of written contracts; nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not to *establish* an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement. (Higginson v. Clowes, 15 Ves. 516; 1 V. & B. 524; Squire v. Campbell, 1 My. & Cr. 459, 480.) But rectification by making the contract include obligations or a subject-matter to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all. Such rectification, where the enlarged operation includes that which is within the statute of frauds, must be accomplished, if at all, under the other head of equity jurisdiction, namely, fraud." [I remark in this connection, that it is difficult to understand what the learned judge means by this last statement. The ground on which the plaintiff in the suit sought relief *was* fraud—direct fraudulent misrepresentations by the defendant, and not mere mistake: and the relief was denied because, as the court said, the granting it would violate the statute of frauds. How then could the relief be sought, consistently with this view, under the jurisdiction over fraud? It is possible that he refers to the remedy of *rescission* based upon fraud; but the use of the word "rectification" seems to be opposed to this explanation.] The same view of the doctrine was maintained in Elder v. Elder, 10 Me. 80, *per* Weston, J., although it does not appear that any fraud was alleged as in the Massachusetts case. See, also, as supporting the same theory with more or less directness, Osborn v. Phelps, 19 Conn. 63; Miller v. Chetwood, 1 Green Ch. 99; Dennis v. Dennis, 4 Rich. Eq. 307; Westbrook v. Harbeson, 2 McCord Eq. 112; Climer v. Hovey, 15 Mich. 18; Whitteaker v. Vanschoiack, 5 Oreg. 113; Best v. Stow, 2 Sandf. Ch. 298. The American editor of the Leading Cases in Equity seems to favor the same view in his notes to Woollam v. Hearn, vol. 2, pp. 920, 944–1040 (4th Am. ed.)

not and could not enlarge their statutory jurisdiction by implication. This fact has exerted a most marked influence upon these courts in their manner of dealing with general topics which were partly embraced within the terms of the local statutes.[1] Passing by this fact, however, the decisions themselves are, in my opinion, based upon a misconception and misinterpretation of the true province and methods of equity in dealing with mandatory statutes of form—such as the statute of frauds or of wills—in cases of fraud, mistake, accident, and surprise, so as to prevent the enactments themselves from being made the instruments of injustice.[2] The principles which underlie the theory advocated by the Massachusetts court, if carried out to their legitimate results, would work a virtual revolution in equity jurisprudence, would confine its most salutary remedial functions within very narrow limits, and would overturn doctrines which have been regarded as settled since the earliest periods of the jurisdiction.[3] They would greatly abridge the

[1] See vol. 1, §§ 311–321, 322–337.

[2] See the language of Lord Westbury, in McCormick v. Grogan, L. R., 4 H. L. 82, 97, quoted *ante*, vol. 1, § 431.

[3] In the first place the authorities are overwhelmingly opposed to the fundamental positions maintained by the Massachusetts and Maine courts, and the *ratio decidendi* in these numerous cases is conclusive. The statement necessarily implied by Mr. Justice Wells that the relief of reformation is confined to agreements *not within* the statute of frauds, is without any foundation of fact. The cases are many, decided by the ablest courts, where a reformation and enforcement have been granted of written agreements within the statute of frauds, the effect of which was to enlarge the scope of the writing and make it include and operate upon lands not embraced within its original form—cases belonging to the second class described in a foregoing paragraph. I will refer to a few such instances by way of illustration. In Moale v. Buchanan, 11 Gill & J. 314, a vendor had agreed to sell certain lots; he gave a deed, in pursuance of his contract, in which part of the lots were omitted by mistake. The court granted a rectification and compelled the vendor to convey the other lots. In De Peyster v. Hasbrouck, 11 N. Y. 582, defendant gave a mortgage on a piece of land which he fraudulently induced the plaintiff to believe was a lot containing a tannery and mill, while in fact these structures stood on another lot. The court granted relief by extending the lien of the mortgage so that it should include the land on which the buildings stood. In Wiswall v. Hall, 3 Paige, 313, a grantee intended to purchase and supposed he was obtaining certain land containing a wharf and other structures, and the grantor fraudulently suffered him to take a deed which only conveyed an adjacent and worthless lot. The court granted a reformation and compelled the grantor to convey the true land. In Gouverneur v. Titus, 6 Paige, 347; 1 Edw. Ch. 477, a deed was corrected which by mistake conveyed an entirely different piece of land from the one intended to be purchased. In Flagler v. Pleiss, 3 Rawle, 345, a deed was reformed and made to convey land which had been left out by mistake. In Hendrickson v. Ivins, Saxton, 562, a bond was corrected and enforced against a surety, although the surety's contract was, of course, required to be in writing by the statute. In Tyson v. Passmore, 2 Barr, 122, under the peculiar procedure then prevailing in Pennsylvania, an agreement, which was fraudulently represented as containing an entire tract of two hundred and sixty acres, but which only covered a third of that amount, was virtually reformed, and the defendant compelled to convey the entire tract.

remedy of reformation; they would prevent the court from establishing and enforcing parol contracts which the defendant's actual fraud had prevented from being put into writing; and, in

The case, though in form an action of ejectment, was decided entirely upon equitable principles. See, also, Tilton v. Tilton, 9 N. H. 385; Smith v. Greeley, 14 Id. 378; Blodgett v. Hobart, 18 Vt. 414; Beardsley v. Duntley, 69 N. Y. 577. Mr. Justice Wells would escape from the force of these and other cases of the same class, by claiming that they were decided upon the principle of equitable estoppel. He asserts that relief of the kind under consideration can only be given when the defendant has by his conduct estopped himself from setting up and relying upon the mandates of the statute. It is a complete answer to this ingenious position, that these cases were not in fact decided upon the ground of equitable estoppel. In all the cases of this class, the *ratio decidendi* was in no instance an equitable estoppel. In ascertaining what doctrines and rules have been established by adjudicated cases, we must always inquire what was the *actual* ground of the decision, what was the actual *ratio decidendi* adopted by the courts; it is useless to speculate as to other and *possible* grounds upon which the decisions might have been rested. But, as I shall show in the sequel, even if this class of decisions could be referred to the principle of equitable estoppel, their direct antagonism to the positions of the Massachusetts court would not thereby be lessened.

I will now examine these positions upon principle. The sole ground of opposition to the equitable jurisdiction is the statute of frauds. If there is any force in the objection, it applies as well to fraud as to mistake. Indeed the Massachusetts decision expressly takes this view, and denies the power of granting such relief in cases of fraud as well as in those of mistake; the Maine court does not avowedly push its reasoning to this extreme. In the first place I shall suggest some considerations *negatively*. A fatal objection to the whole theory is that it proves too much; if accepted as a true *principle* of equity, it necessarily destroys *uno flatu* several branches of the jurisdiction which are among its most familiar and salutary instances of relief. This theory is not in its essence directed against the remedy of specific performance, but against that of reformation; the act which these courts find to be so impossible is the *construction* of a contract by parol evidence, not the enforcement of a contract after it is constructed. The theory, therefore, militates against the remedy of reformation as such in all its phases, and as distinct from the subsequent remedy of enforcement. It also seems, notwithstanding the ingenious and very refined distinctions drawn by the Massachusetts court, to militate no less against the remedy of rescission. In short, if this theory be accepted, it must nullify the well-settled doctrines which permit a plaintiff to reform a written contract which, through fraud or mistake, does not express the real intent of the parties as shown by their prior parol agreement; and which permit a defendant to vary an agreement and enforce it as varied. It is well settled that both of these proceedings may be had; and neither the English nor the American courts have suggested the limitation that they can only be resorted to where the written instrument includes too much and the relief consists in narrowing its operation. But each of these proceedings is in appearance a violation of the statute of frauds, and is certainly prohibited by the principles of the theory which I am examining. Each of them is, in fact, the establishing by parol a contract which the statute says can only be established by writing. Nor can I see any *essential* distinction between the remedy of reformation in these instances and that of *rescission* when the party, in order to lay the foundation for the rescission, is obliged to show by parol evidence a departure in the written instrument from the intent as verbally agreed. The party proves by parol evidence that there was a verbal contract broader than the written one, and because the written one thus varies from this agreement, it is set aside. The gist of the proceeding lies not in the nature of the remedy, whether it be rescission or reformation, but in the establishment by means of parol evidence of a contract which embraces more than the written instrument does, and in thus do-

fact, these principles can not be reconciled with the doctrines upon which the jurisdiction of equity to enforce parol contracts in cases of part performance, is vested. The statute of frauds

ing what it is said the statute forbids. Again, this theory is in direct conflict with the well-settled doctrine, that if one of the parties to a contract which is required by the statute of frauds to be in writing, by his own fraudulent practices prevents it from being reduced to writing in compliance with the statute, equity will interfere at the suit of the other party and will enforce the agreement although verbal. (See Mestaer v. Gillespie, 11 Ves. 627, 628, *per* Lord Eldon; Montacute v. Maxwell, 1 P. Wms. 618; Haigh v. Kaye, L. R., 7 Ch. 469; Whitridge v. Parkhurst, 20 Md. 62; Jenkins v. Eldredge, 3 Story, 181; Taylor v. Luther, 2 Sumn. 228; Barnard v. Flinn, 8 Ind. 204.) Finally, this theory, if correct, would at once overturn the whole jurisdiction of establishing and enforcing a parol contract which has been partly performed. The Massachusetts court accounts for the numerous cases in which written instruments within the statute of frauds have been reformed and enforced by enlarging their operation and making them include new subject-matter, by referring them all to the doctrine of equitable estoppel. This explanation, while conceding that such cases were correctly decided, is insufficient, and fails to remove the inconsistency and antagonism between those decisions and the theory maintained by the court. If the statute of frauds is so peremptory in its mandates that it forbids the proof of a contract by parol when it ought to be in writing, upon the occasion of fraud or mistake, it is equally peremptory in forbidding such proof upon the occasion of an equitable estoppel. It is just as much a violation of the statute to permit a contract to be established by parol evidence on the plea of an estoppel from mere conduct, as on the plea of fraud or mistake. If the statute may be avoided on the one ground it may be on the other; and it should be borne in mind that the sole foundation for the theory is the inviolability of the statute. There is nothing in an equitable estoppel which gives it any more power to dispense with the statute, than may be given to fraud or mistake. In fact, the very foundation of the doctrine of equitable estoppel is the notion that it would be a virtual fraud upon one party if the other was not estopped; and some American courts have gone so far in this direction as to hold that *actual* fraud is an indispensable element of every equitable estoppel. It thus appears that the principles involved in this theory, if adopted, would undermine all these various instances of equitable jurisdiction, and the objections urged by the courts in support of the theory prove too much.

To the foregoing negative observations, I shall now add an affirmative criticism of theory. Notwithstanding the great learning and eminent ability of the courts which have announced it, the theory involves, as it seems to me, a misconception of the fundamental principles of equity jurisprudence, a failure to grasp those essential principles in their true nature, operation, and effects. As occasions for the exercise of equitable jurisdiction and for the granting of equitable relief, fraud and mistake stand upon exactly the same footing; their effects upon the rights of the injured party are the same; the necessity which they create for relief is the same. It is true that there is an element of moral wrong in fraud, which is not present in mistake where it at first occurs, and a judge feels inclined to punish the wrong-doer. But it is a principle which is fundamental and should never be forgotten, that equity relieves against fraud on account of its effects upon the rights of the injured party, and not on account of the moral delinquency of the wrong-doer. Now, the effects of a pure mistake upon the rights of the suffering party are the same, as injurious, and calling as loudly for relief, as those of fraud. Furthermore, although in the original mistake there is no element of immorality, yet afterwards when the mistake is discovered, and the party benefited insists upon retaining its advantages, and refuses to voluntarily correct the error but plants himself upon the strict *legal* rights which the erroneous writing gives him, there is but a very shadowy distinction between the immoral character of his conduct and that of the person who intentionally by misrepresentations and conceal-

is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong. Equity does not deny nor overrule the statute; but it declares that fraud or

ments induces another to enter into an agreement. And for this reason we find judges constantly describing the conduct of persons in such a situation, who insist upon holding the advantages accidentally obtained by mistake, as fraudulent, and the persons themselves as guilty, from a moral point of view, of virtual if not actual fraud. Whatever power, therefore, courts of equity possess to prevent and remove the consequences of fraud, they also possess in dealing with the effects of mistake. What then is the true principle upon which equity grants its reliefs on the occasion of fraud or mistake in written instruments, especially when these remedies seem to militate against the provisions of the statute of frauds. There are many settled doctrines of equity which maintain, protect, and enforce rights both of property and of remedy in seeming antagonism to the statutes of frauds, of wills, of recording, and the like. It has been shown in the first volume that in all such instances, equity does not overrule the statute, nor deny nor disturb the *legal* title protected by the statute; it fastens a personal obligation upon the conscience of the party, and compels him to hold and use his legal title for the benefit of the other person who is recognized by the court as possessing the beneficial right. (See vol. 1, §§ 430, 431, and the language of Lord Westbury there quoted.) The principle is unalterably fixed in the foundations of the jurisprudence, that equity will not suffer a statute passed for the purpose of preventing fraud, to be used as an instrument for accomplishing fraud; the statute will be uplifted when necessary to prevent such a result. One or two examples will serve to illustrate this grand principle. In the case of enforcing a verbal contract on the ground of part performance, the relief is wholly based upon the notion that for the defendant—the vendor—to insist upon the statute and to set it up as a bar, would be a fraud upon the plaintiff. Although the fraud is merely constructive, yet because the mere act of setting up the statute as a peremptory defense would be a virtual fraud, a court of equity treats the statute as uplifted; it fastens a personal obligation upon the conscience of the defendant, and compels him to hold his legal title in trust for the plaintiff and to perform the obligation by a conveyance. It is the same when parties have entered into a verbal agreement which the statute of frauds requires to be in writing in order to be binding, and one of them by his fraudulent conduct prevents it from being executed in a written form. Here according to the terms of the statute there is *no* contract; and, according to the theory under review, there being no contract, it should be impossible for a court of equity to construct one by parol proof of what the parties had agreed upon, and to enforce it when established. But a court of equity is not in the least hindered by these considerations nor prevented from granting its relief. The fraud being shown and the contract proved by parol evidence, the court is not embarrassed by the statute. It fastens upon the wrong-doer a personal obligation to do exactly what he had verbally agreed to do, and if necessary, treats him as holding the legal title to the subject-matter in trust for the plaintiff, and compels him to consummate his own duty and the other's right by a conveyance; and thus the statute is uplifted. The same principle applies to facts and circumstances like those involved in the case of Glass v. Hulbert. When A. and B. have made a verbal agreement by which A. is to convey certain lots of land, and in putting this agreement into a written form, through mistake or the fraud of A., the writing includes only a portion of the lots, or different land from that intended by the parties, a court of equity is not any more obstructed by the statute in granting relief, than in the instances before mentioned. The real agreement and intention being shown by parol evidence, the court fastens a personal obligation upon A.; it treats him as holding the legal title of the lots really intended in trust for the vendee; and it works out and executes this trust by compelling a conveyance. It follows from the foregoing analysis of the principle, as well as from the general current of authorities, that, in granting the equitable

mistake creates obligations and confers remedial rights which are not within the statutory prohibition; in respect of them, the statute is uplifted. A more detailed examination of the theory advocated by these decisions, which its importance seemed to require, I have placed in the foot-note.

§ 868. **IV. Instances of Equitable Jurisdiction Occasioned by Mistake. By Way of Defense.**—I shall, in concluding this section, enumerate the various modes in which the equitable jurisdiction may be exercised, and the various forms of remedy which may be granted, on the occasion of mistake, These modes and forms will be *enumerated;* the full discussion of the doctrines and rules which govern the remedies themselves, and regulate the exercise of the jurisdiction in awarding them, will be given in the subsequent chapters which treat of remedies. The jurisdiction may be exercised either *defensively* or *affirmatively.* In equitable suits to compel the specific performance of contracts, or to enforce the obligation arising out of contract, or to enforce an obligation arising out of any other transaction, the defense of mistake is available to defeat or modify the relief. Of course the mistake alleged and proved by the defendant must in all respects conform to the rules heretofore stated concerning the requisites of mistake in equity; it must be material, and must have determined the action of the party in entering into the contract or transaction. It may be common to both parties; it may be induced or procured by the conduct of the plaintiff; or it may be an error of the defendant alone, wholly due to himself. In either case it will be a defense. The effect of mistake as a defense in equitable actions has already been considered in the former paragraphs which treat of the admission of parol evidence, and the decisions there

relief of reformation and enforcement in such cases of mistake or fraud, it makes no possible difference whether the failure of the written instrument to express the real agreement and intent of the parties consists in its including too much or too little; it is immaterial whether the verbal contract to be proved by parol is broader than the written instrument, covering more or different subject-matter, or is narrower, embracing only a part of the subject-matter or terms which are found in the writing; whether the reformation shall enlarge the scope of the written contract by adding other terms or subject-matter, or shall restrict it by subtracting from its terms or subject-matter. In either of these instances the statute of frauds opposes no obstacle to relief, since in pursuance of the very principle upon which equity intervenes and grants *any* relief, the statute is regarded as uplifted, so that it may not become the instrument of perpetuating the very fraud which it was designed by the legislature to prevent. That this principle has been established on the grounds and to the extent which I have described, no one acquainted with the course of decision in the English and American courts can deny; and, in my opinion, notwithstanding occasional doubts and even protests from individual judges, they have not thereby exceeded their proper powers and functions.

cited will furnish examples and illustrations.[1] In states which have adopted the reformed procedure, the equitable jurisdiction may also be invoked, if necessary, by defendants in legal actions. This may be done by means of equitable defenses which simply defeat the plaintiff's legal cause of action, or by means of equitable counter-claims or cross-complaints, which demand for the defendant some affirmative relief, as reformation or cancellation.[2]

§ 869. **By Way of Affirmative Relief: Recovery of Money Paid by Mistake.**—The jurisdiction to confer affirmative relief will only be exercised in cases where an adequate remedy can not be obtained at law. Whenever money has been paid, or chattels have been delivered, through mistake, the legal remedy by action will ordinarily be adequate and certain; in fact, the action to recover back money paid by mistake is a very familiar one at law. Whenever land has been conveyed, or contracted to be conveyed, through mistake, the adequate remedy of the grantor or vendor would generally require the equitable relief of a cancellation. Although an action at law will ordinarily lie to recover back money paid through mistake, still, if the circumstances are special and such that an action at law will either not lie at all, or will furnish an inadequate relief, a court of equity has undoubted jurisdiction, and will entertain a suit for the recovery of the money, if in good conscience it ought to be repaid.[3]

§ 870. **Affirmative Relief: Reformation and Cancellation.**—The most important affirmative remedies conferred by an exercise of the equitable jurisdiction on the occasion of mistake, are cancellation and reformation. Cancellation is appropriate when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of a mistake of both or one of the parties, either no agreement at

[1] See *ante*, § 860; see, also, Allen v. Richardson, L. R., 13 Ch. D. 524; Jones v. Clifford, 3 Id. 779; McKenzie v. Hesketh, 7 Id. 675; Denny v. Hancock, L. R., 6 Ch. 1; Davis v. Shepherd, 1 Id. 410; Wycombe Ry. v. Donnington Hospital, 1 Id. 268; Hooper v. Smart, L. R., 18 Eq. 683; Baskcomb v. Beckwith, 8 Id. 100; Whittemore v. Whittemore, 8 Id. 603; Moxey v. Bigwood, 4 De G. F. & J. 351; Parker v. Taswell, 2 De G. & J. 559; Webb v. Kirby, 7 De G. M. & G. 376; Price v. Macaulay, 2 Id. 339; Swaisland v. Dearsley, 29 Beav. 430; Alvanley v. Kinnaird, 2 Macn. & G. 1, 7; Helsham v. Langley, 1 Y. & C. 175; Howell v. George, 1 Madd. 1; Mason v. Armitage, 13 Ves. 25; Doggett v. Emerson, 3 Story, 700; West R. R. v. Babcock, 6 Metc. 346; Post v. Leet, 8 Paige, 337; Mortimer v. Pritchard, 1 Bailey Eq. 505.

[2] See *ante*, § 862; see Arthur v. Homestead F. Ins. Co., 78 N. Y. 462.

[3] Davis v. Morier, 2 Coll. 303; *Ex parte* James, L. R., 9 Ch. 609; Rogers v. Ingham, Id., 3 Ch. D. 351, 356; Bingham v. Bingham, 1 Ves. sen. 126. As to mistake in settling accounts and relief from, see Gething v. Keighley, L. R., 9 Ch. D. 547.

all has really been made, since the minds of both parties have failed to meet upon the same matters; or else the agreement or transaction is different, with respect to its subject-matter or terms, from that which was intended.[1] Reformation is appropriate, when an agreement has been made, or a transaction has been entered into or determined upon, as intended by all the parties interested, but in reducing such agreement or transaction to writing, either through the mistake common to both parties, or through the mistake of the plaintiff accompanied by the fraudulent knowledge and procurement of the defendant, the written instrument fails to express the real agreement or transaction. In such a case the instrument may be corrected so that it shall truly represent the agreement or transaction actually made or determined upon according to the real purpose and intention of the parties.[2] The rules which govern these remedies and determine when they may be conferred, together with the various kinds and classes of instances in which they have been granted, will be found in subsequent chapters.

§ 871. **Conditions of Fact which are Occasions for Affirmative Relief.**—The conditions of fact which furnish occasions for the exercise of the jurisdiction to grant affirmative relief, either of reformation, of cancellation, or of pecuniary recovery, are many and various. The following are some of the most important. The relief which equity gives in aid of a defective execution of powers may be occasioned by mistake as well as by accident.[3] Judgments at law recovered through mistake may be a ground for the interposition of equity in enjoining or setting aside the judgment, to the same extent and under the same limits as those recovered by accident.[4] Mar-

[1] Illustrations. Childers v. Childers, 1 De G. & J. 482; Cooper v. Joel, 1 De G. F. & J. 240; Bentley v. Mackay, 4 Id. 279; Henkle v. Royal Ex. Ins. Co., 1 Ves. Sen. 317; Marquis of Townshend v. Stangroom, 6 Ves. 328; Holmes v. Clark, 10 Iowa, 423; Jackson v. Andrews, 59 N. Y. 244; Nevins v. Dunlap, 33 Id. 676; Story v. Conger, 36 Id. 673; Welles v. Yates, 44 Id. 525; Diman v. Providence R. R., 5 R. I. 130, 135; Sawyer v. Hovey, 3 Allen, 331; Woodbury etc B'k v. Ins. Co., 31 Conn. 517; Tessen v. Atlantic Ins. Co., 40 Mo. 33.

[2] Illustrations. Baker v. Paine, 1 Ves. Sen. 456; White v. White, L. R., 15 Eq. 247; Bloomer v. Spittle, Id. 13 Eq. 427; Mackenzie v. Coulson, Id. 8 Eq. 368; Fowler v. Fowler, 4 De G. & J. 250; Rider v. Powell, 28 N. Y. 310; De Peyster v. Hasbrouck, 11 Id. 582; Ford v. Joyce, 78 Id. 618; Moran v. McLarty, 75 Id. 25; Cone v. Niagara Ins. Co., 60 Id. 619; Comer v. Himes, 49 Ind. 482, 489; Heavenridge v. Mondy, 49 Id. 434; Winnipiseogee etc. Co. v. Perley, 46 N. H. 83; Wooden v. Haviland, 18 Conn. 101; Langdon v. Keith, 9 Vt. 299; Firmstone v. DeCamp, 17 N. J. Eq. 317; Weston v. Wilson, 31 Id. 51; Sanders v. Wagner, 32 Id. 506; Gump's Appeal, 65 Pa. St. 476; Chew v. Gillespie, 56 Id. 308; Dulany v. Rogers, 50 Md. 524; Bradford v. Union B'k, 13 How. (U. S.) 55, 57, 66.

[3] See *ante*, §§ 589, 590, 834, 835, where this particular instance of the jurisdiction is explained.

[4] See *ante*, § 836.

riage settlements may be corrected when through mistake they do not represent the original agreement between the parties, either with respect to their subject-matter or their terms; and especially where the formal instrument does not correspond with the preliminary writings.[1] Family compromises and settlements may certainly be set aside or corrected, but the jurisdiction is exercised with great caution, and never unless the mistake is palpable so as to indicate a surprise, or unless there are incidents of inequitable conduct by some of the parties.[2] Equity has a very narrow jurisdiction to correct mistakes in wills, but only when the error appears upon the face of the will itself, so that both the mistake and the correction can be ascertained and supplied by the context, from a plain interpretation of the terms of the instrument as it stands. A resort to extrinsic evidence is never permitted either to show a mistake or to ascertain the correction. Mistakes which can be thus corrected may be in the names of legatees or devisees, in the description of property or in other terms.[3] The jurisdiction to grant the

[1] Higginson v. Kelly, 1 Ba. & B. 252; Wright v. Goff, 22 Beav. 207; Breadalbane v. Chandos, 2 My. & Cr. 711; Bold v. Hutchinson, 5 De G. M. & G. 558, 566; Hanley v. Pearson, L. R., 13 Ch. D. 545; *In re* Daniel's Settlement, Id. 1 Ch. D. 375; *In re* Bird's Trusts, Id., 3 Ch. D. 214; Smith v. Iliffe, Id., 20 Eq. 666; Cogan v. Duffield, Id., 20 Eq. 789; *In re* De la Touche's Settlement, Id. 10 Eq. 599; Elwes v. Elwes, 3 De G. F. & J. 667. As to setting aside a marriage settlement, see Evans v. Carrington, 2 Id. 481; Merryweather v. Jones, 4 Giff. 509; Hartopp v. Hartopp, 21 Beav. 259.

[2] See *ante*, §§ 850, 855.

[3] When evidence of circumstances is admitted to explain an ambiguity, this is not for the purpose of correcting a mistake. The following cases illustrate the extent and limits of this jurisdiction: *In re* Aird's Estate, L. R., 12 Ch. D. 291; Whitfield v. Langdale, Id., 1 Id. 61; Barber v. Wood, Id., 4 Id. 885; Newman v. Piercey, Id. 41; Wilson v. Morley, Id., 5 Id. 776; Travers v. Blundell, Id., 6 Id. 436; Homer v. Homer, Id., 8 Id. 758; Garland v. Beverley, Id., 9 Id. 213; *In re* Nunn's Trusts, Id., 19 Eq. 331; Farrer v. St. Catharine's Coll., Id., 16 Id. 19; Hardwick v. Hardwick, Id., Id. 163; McKechnie v. Vaughan, Id., 15 Id. 289; *In re* Ingle's Trusts, Id., 11 Id. 578; Hall v. Lietch, Id., 9 Id. 376; Box v. Barrett, Id., 3 Id. 244; Hart v. Tulk, 2 De G. M. & G. 300; Campbell v. Bouskell, 27 Beav. 325; Taylor v. Richardson, 2 Drew. 16; Snyder v. Warbasse, 3 Stockt. 463; Wood v. White, 32 Me. 340; Jackson v. Payne, 2 Metc. (Ky.) 567; Goode v. Goode, 22 Mo. 518; Trexler v. Miller, 6 Ired. Eq. 248; Johnson v. Hubbell, 2 Stockt. Eq. 332; Yates v. Cole, 1 Jones' Eq. 110; McAlister v. Butterfield, 31 Ind. 25; Erwin v. Hamner, 27 Ala. 296; Machem v. Machem, 28 Id. 374; Alter's Appeal, 67 Pa. St. 341; Nutt v. Nutt, 1 Freem. Eq. 128; and see Kerr on Fraud and Mist., pp. 448–453. The rules upon this subject belong to the general doctrine concerning the interpretation of wills, and will be found in work which treats of wills. The subject of correcting mistakes in wills, mentioned in the text, needs a little fuller explanation. There is no jurisdiction of equity to entertain suits for the reformation of wills analogous to that for the reformation of conveyances, agreements, and the like. The power to correct mistakes in wills is simply a part of the more general function of construction and interpretation, and may be exercised, if at all, in administration suits, or in any other suits wherein the rights of parties under the will are adjudi-

relief of reformation may be exercised with respect to written

cated. In many of the States it would be exercised by courts having a probate jurisdiction in the proceedings for the final settlement and distribution of the estate. However exercised, the power only exists within very narrow limits. The only possible modes of correcting mistakes in wills, are by transposing, rejecting, or supplying words or clauses; and the fundamental principle is settled, that *both the error, and the correction of it, must appear with certainty on the face of the will itself,* and extrinsic evidence can never be resorted to for that purpose. Courts find little difficulty in transposing the order of words or dispositions so that all shall be reconciled, and an effect be given to each and to the whole. This is not an infrequent step in the process of interpretation. Rejecting a word or clause is also not an extreme measure where the context clearly requires it. To supply a word or clause demands a very strong and unusual case, where it must certainly appear that something has been omitted by inadvertency. Even then the alternative that the whole disposition should be rejected as unmeaning, might be adopted. If a clause is to be rejected, the necessity for it must arise from the face of the will itself. If a word or clause is to be supplied, the necessity for such a supply, *and also the very word or clause itself to be supplied,* must appear from the face of the will. The case of Du Bois v. Ray, 35 N. Y. 162, which contains a full citation of authorities, furnishes an excellent example. Children which a named person "may leave," was read as though changed to "may have." The case of patent ambiguities, which admit extrinsic evidence in order to identify the person or thing intended, is not an exception to the foregoing conclusions, since patent ambiguities are in no true sense of the term mistakes. I add a few illustrations of such correction of errors, taken from the decisions.

Cases of Supplying Words.—Where, from the will generally, it is clear that certain words are omitted from part of it, and also what these words are, the omission may be supplied. Thus where there was a gift to A. and B., and "if either died before twenty-one, and without issue," his share to go to the other, and "if both died without issue," then the property to go to a third person, C.; the words "before twenty-one," were supplied in the latter part, so that the clause should read, "if both died before twenty-one and without issue," then the property to go to C. Kirkpatrick v. Kirkpatrick, 13 Ves. 476; Sheppard v. Lessingham, Ambl. 122; Spalding v. Spalding, Cro. Car. 185. In another case, a similar gift to A. and B., and if either died "without *leaving* issue," then to the other, and if both should die "without issue," then the property was to go over to C.; the word "leaving" was supplied in the last clause, so that it should read "if both died without *leaving* issue," then over to C.; since the latter form was necessary at the time to render the executory devise over valid. Radford v. Radford, 1 Keen, 486. These examples sufficiently illustrate the correction by simply supplying words.

Cases of Rejecting Words.—Particular words, inconsistent with the clearly expressed provisions and purposes of the will, may be rejected, but only by an inspection of the will itself, without aid from extrinsic evidence. Thus, where freehold lands were devised to A. for ninety-nine years, with remainder *after the death* of A. to his eldest son in tail, and then to his other sons successively, the words giving an absolute term of ninety-nine years to A. were rejected, and he was left to take a life-estate, in accordance with the other limitations. Coryton v. Helyar, 2 Cox, 340; and see Chapman v. Gilbert, 4 De G. M. & G. 366. In a devise to A. and to his heirs *for their lives*, the words "for their lives" were rejected as unmeaning and inconsistent. Doe v. Stenlake, 12 East. 515; Doe v. Thomas, 3 A. & E. 123; Hugo v. Williams, L. R., 14 Eq. 224. In a bequest to "my *aforesaid* nephews and nieces," the word "aforesaid" was rejected, none having been before mentioned in the will. Campbell v. Bouskell, 27 Beav. 325.

Transposing and Changing Words. If the testator's language is without meaning as it stands, but can be made intelligible by a transposition of words, this will sometimes be done to carry out the intent clear from the will as a whole. Thus if it be *quite clear* from the context that in describing Whiteacre he means Blackacre,

instruments operating *inter vivos*, whether they are executed

and in describing Blackacre he means Whiteacre, a transposition of the names will be allowed, so as to make the disposition correspond with the limitation. See Mosley v. Massey, 8 East, 149; Doe v. Allcock, 1 B. & Ald. 137, *per* Holroyd, J. But any such correction must be made without the aid of extrinsic evidence; it must clearly appear from the will what the mistake is, and must be equally clear from the will what correction is needed. *E. g.*, a will contained several numbered schedules, and the testator in a certain clause referred to one number by evident mistake for another, and this was corrected. Hart v. Tulk, 2 De G. M. & G. 300. In Marshall v. Hopkins, 15 East, 309, there was a devise of a "messuage, lands, and appurtenances in the occupation of A.," and these words "in the occupation of A." were read as coming directly after the word "messuage," so that the whole should be the "messuage in the occupation of A., lands and appurtenances," since the rest of the will showed certainly that this correction was necessary to make sense.

"*Or*" *Changed to* "*And.*"—One of the most common instances of correction is the changing "or" to "and," and *vice versa*. This change is most often made when the intention of the will is clear to provide for a person *and his issue*, but in the gift over to third persons in the event of there being no issue, the contingency is expressed in such a manner that, if read literally, it would, under the settled rules of law, wholly defeat the plain intention. *E. g.*, a devise to A. and to his heirs, and if A. died under twenty-one *or* without issue, then the property was to go over to a third person, C.; A. died *under* twenty-one, but leaving a child; "or" was read "and," so that it was held that *both* events must happen, viz.: A.'s death under twenty-one, and his death without issue—before the gift over to C. could take effect. See Soulle v. Gerrard, Cro. Eliz. 525; Moore, 422; Walsh v. Peterson, 3 Atk. 193; Framlingham v. Brand, Id. 390; Greated v. Greated, 26 Beav. 621; Miles v. Dyer, 5 Sim. 435. Also, where there was a gift to A. in either of two events, his attaining the age of twenty-five *or* his marrying, and a gift of the property over to B. in case A. died under twenty-five *or* died unmarried, the last "or" was read "and" as a matter of necessity, to make it correspond with the meaning of the gift to A. Grant v. Dyer, 2 Dow. 73. The cases are numerous in which "or" has been changed to "and," but these instances are sufficient as illustrations.

"*And*" *Changed to* "*Or.*"—In the same manner "and" is occasionally read "or," for the purpose of carrying out the testator's intention; but never without an imperative necessity for the change, apparent on the face of the will. See *In re* Sanders' Trusts, L. R., 1 Eq. 675; *In re* Kirkbride's Trusts, Id., 2 Eq. 400. *E. g.*, where the will gave a bequest to a *class* of persons at a particular time—at the testator's death—"*and* to such of them as shall then be living," the word "and" was a plain mistake for "or," and a change to "or" was necessary to carry into effect the plain intent. Hetherington v. Oakman, 2 Y. & C. Ch. 299; Maynard v. Wright, 23 Beav. 285. These examples show that the power of courts to correct actual mistakes in wills, as a part of their function of interpretation, by supplying, rejecting, transposing, or substituting words, is confined within very narrow and well-defined limits, and is never to be exercised except when the general purpose or scheme of the will is clear beyond a doubt, and as clearly and positively demands the correction in order that this purpose and scheme may be carried into effect.

As I have before stated, these are all the instances of true *mistakes* in the language of wills which furnish an occasion for the power to correct. In order to complete this general view, however, I will add a few illustrations of *misdescriptions* either of property given or of the beneficiaries to whom it is given, which become known from the general evidence of the surrounding circumstances which is always admissible. Such *misdescriptions* being discovered by the extrinsic evidence, *may* be harmonized, explained, and made effective through the instrumentality of such evidence. But it should be carefully observed, that this process of adjusting the *misdescriptions* to the actual conditions of fact, is in no proper sense a *correction of mistakes*.

contracts, such as deeds of conveyance, mortgages, leases, or

Misdescription of the Property Given. In respect to such misdescriptions, the maxim *falsa demonstratio non nocet* often controls and prevents a failure of the gift. Where the description consists of two parts, one of which is accurate and sufficient if it stood alone, and the second is incomplete and erroneous, this maxim generally applies—always does so if the property answers to the accurate part of the description, and there is no other property of the testator to which such description in any of its parts can apply. Thus, if the property is accurately described in other respects, an error as to the county in which it is stated to be situated is immaterial, if the testator had no other property answering to the description. Hastead v. Searle 1 Ld. Raym. 728. If the property is commonly known by some particular name, as Whiteacre, and is devised by that name, the addition of some farther erroneous description, as that it is in the occupancy of A., while in fact it was in that of B., does not defeat the gift. Blague v. Gold, Cro. Car. 447; and see Howard v. Conway, 1 Coll. 87; Stephens v. Powys, 1 De G. & J. 24. Lands being correctly described as at or near A., in the parish of B., the inaccurate addition of their being in the testator's occupation would not defeat the gift. White v. Birch, 36 L. J. (Ch.) 174; but see Doe v. Parkin, 5 Taunt. 321. Under the description "my farm called Whiteacre, in the occupation of A.," lands forming part of the farm, but not occupied by A., would be included in the devise. Goodtitle v. Southern, 1 M. & S. 299; Down v. Down, 7 Taunt. 343; and see in respect to such kinds of description, Slingsby v. Grainger, 7 H. L. Cas. 273, *per* Lord Cranworth; Press v. Parker, 2 Bing. 456; Polden v. Bastard, L. R., 1 Q. B. 156; Doe v. Martin, 4 B. & Ad. 771; Bodenham v. Pritchard, 1 B. & C. 350; Waite v. Morland, 12 Jur. (N. S.) 763.

Description consisting of Several Terms.—If the description is ambiguous, it is a leading principle that if there are several terms of the description applied to the subject-matter of the gift, every such term *may* be material, and if there *is* property corresponding with the description in *every* particular, it alone will in general pass, to the exclusion of other property which answers to the description only in part. For example, a testator having said that he owned certain lands in A. subject to a mortgage, devised *the said lands;* this was held not to include lands of the testator in A. which were not mortgaged. Pullin v. Pullin, 3 Bing. 47. A devise of lands at A., held of B., in the occupation of C., would not carry land not in C.'s occupation, there being other lands in his occupation and so answering to the description. Morrell v. Fisher, 4 Exch. 591. Where a testator devised his "messuages *at, in, or near* A., and purchased from B.," and it appeared that he owned two houses about twenty yards from A., and four other houses about four hundred yards from A., and that all six had been purchased from B. by one conveyance, it was held that the devise embraced only the two first mentioned, as being *at, in, or near* A. Doe v. Bower, 3 B. & Ad. 453.

Property Answering the Description. It is a settled general rule that where there *is* property answering the description, then no other will pass. Thus if an estate is situated in two counties, towns, or places, A. and B., even if there is no division line, and the whole is used and enjoyed as one property, and the testator devises only by the description "my house, lands, farms, etc., *in* A.," that part of the estate alone which is in A. will pass by the gift. Webber v. Stanley, 16 C. B. (N. S.) 698; Pedley v. Dodds, L. R., 2 Eq. 819; Smith v. Ridgway, Id., 1 Exch. 331; Lister v. Pickford, 34 Beav. 576; Doe v. Oxenden, 3 Taunt. 147; 4 Dow. 65; but see Harman v. Gurner, 35 Beav. 478. The testator had purchased a house and some lands situated in two towns from A., and he devised by description all his "house, farm, and lands situate in" *one* of the towns, and the land situate in the other town was held not to be included in the gift. Doe v. Lyford, 4 M. & S. 550. A testator possessed four pieces of land, A., B., C., and D., all held under one lease, and devised the A., B., and C. tracts, and the D. tract was held not to pass. West v. Lawday, 11 H. L. Cas. 375. On the other hand, a devise mentioning four houses as given, the court held from the context that

executory agreements, such as bonds, policies of insurance, notes, bills of exchange, and the like.[1] There is, of course, no power to reform wills.[2] The relief of cancellation may be granted with respect to deeds of conveyance, mortgages, agreements concerning land, and other similar transactions, subject always to the important limitation that the party can obtain no adequate remedy at law.[3] With respect to mistakes in awards, the jurisdiction exists, but will be exercised only within very narrow limits. If a mistake appears on the face of the award itself, or in some contemporaneous writing, or is voluntarily admitted by the arbitrator, or he states circumstances which clearly show an error, equity may relieve by setting aside or perhaps correcting the award; otherwise there is no ground for interference.[4] A court of equity, may, perhaps, under special circumstances, exercise its jurisdiction by correcting mistakes in judgments and decrees and other records, where the error is

five were meant and were included in the devise. Sampson v. Sampson, L. R., 8 Eq. 479.

Names of Beneficiaries.—Cases of mistakes in the names of devisees and legatees are very numerous. In very many instances the ambiguity is such that extrinsic evidence is necessary to identify the person intended. This particular kind of error properly belongs, therefore, to the general subject of extrinsic evidence in aid of the interpretation of wills. Where there is some error in the name, the beneficiary is sometimes connected with other description which will identify the individual, and obviate the error by bringing it within the maxim "*falsa demonstratio non nocet.*" *E. g.*, a bequest to A. B., the right name, with the erroneous addition "legitimate son of C.," has been sustained. Standen v. Standen, 2 Ves. 589; Giles v. Giles, 1 Keen, 688. Where a devise was to the second son of Edward W. of a certain place, the second son of Joseph W., of that place, was held entitled to take. Lord Camoys v. Blundell, 1 H. L. Cas. 778. Collateral descriptions of the beneficiary are often sufficient to identify him, and to obviate an error in his name. *E. g.*, under a bequest to William A., eldest son of Charles A., it was held that Andrew A., who was the eldest son, was entitled. Pitcairn v. Brase, Finch, 403; and see Dowsett v. Sweet, Ambl. 175; Stringer v. Gardiner, 4 De G. & J. 468. Under a bequest to "Clare Hannah, the wife of A.," the wife of A. was held entitled, although her name was simply Hannah, and she had a daughter named Clare Hannah. Adams v. Jones, 9 Hare, 485; and see Ryall v. Hannam, 10 Beav. 536; Hodgson v. Clarke, 1 De G. F. & J. 394. These are a very few out of a great number of examples of errors in the names and descriptions of beneficiaries which have been corrected by the context, and in the light of the surrounding circumstances.

[1] See cases cited *ante*, under § 870.

[2] Sherwood v. Sherwood, 45 Wisc. 357.

[3] See *ante*, § 870.

[4] Mordue v. Palmer, L. R., 6 Ch. 22; Morgan v. Mather, 2 Ves. 15; Knox v. Symmonds, 1 Id. 369; Mills v. Bowyers' Soc., 3 K. & J. 66; Houghton v. Bankart, 3 De G. F. & J. 16; Haigh v. Haigh, 3 Id. 157; Goodman v. Sayers, 2 J. & W. 249; Young v. Walter, 9 Ves. 364; Roosevelt v. Thurman, 1 Johns. Ch. 220; Bouck v. Wilber, 4 Id. 405; Underhill v. Van Cortland, 2 Id. 339; 17 Johns. 405; Winship v. Jewett, 1 Barb. Ch. 173; Hartshorn v. Cuttrell, 1 Green's Ch. 297; Ryan v. Blunt, 1 Dev. Eq. 386. If the award is within the submission, no mistake of the arbitrator, either of law or of fact, established by extrinsic evidence will be a ground for the interference of equity. The subject of awards and of the proceedings thereon has in many states been so regulated by statute, that the jurisdiction of equity over them has become unimportant, if not obsolete.

clerical or ministerial, and not judicial, and there is no other means of obtaining the relief.[1] Where an instrument has been surrendered or discharged, or an incumbrance or charge has been satisfied through mistake, the jurisdiction may be exercised by granting such relief as will replace the party entitled in his original position, either by setting aside the formal discharge, or by compelling a re-execution of the instrument.[2] The jurisdiction extends to the settlement of accounts, made according to the intention of the parties, but based upon or involving a mistake. Relief will be granted as the circumstances may require, either by setting aside the settlement, or by permitting a party to surcharge or falsify.[3] Finally, the equitable jurisdiction may be exercised by the relief of a pecuniary recovery for money paid under a mistake, whenever no adequate remedy can be obtained by an action at law.[4] The affirmative reliefs of reformation and of cancellation are, however, subject to the limitation that they are never conferred against a *bona fide* purchaser for value and without notice.[5]

SECTION III.

ACTUAL FRAUD.

ANALYSIS.

§ 872 Objects and purposes.
§ 873. Description; essential elements.
§ 874. Four forms and classes of fraud in equity.
§ 875. Nature of actual fraud.
§§ 876–899. *First.* Misrepresentations.
§ 877. I. The form; an affirmation of fact.
§ 878. Misrepresentation of matter of opinion.
§ 879. II. The purpose for which the representation is made.
§ 880. Presumption of the purpose to induce action.
§ 881. False prospectuses, reports, and circulars.

[1] Barnesly v. Powell, 1 Ves. Sen. 119, 284, 289; Colwell v. Warner, 36 Conn. 224; Loss v. Obry, 22 N. J. Eq. 52; Wheeler v. Kirtland, 23 Id. 13; Gump's App., 65 Pa. St. 476; Byrne v. Edmonds, 23 Gratt. 200; Kearney v. Sacer, 37 Md. 264; Barthell v. Roderick, 34 Iowa, 517; Palmer v. Bethard, 66 Ill. 529; Chapman v. Hurd, 67 Id. 234; Stites v. Wiedner, 35 Ohio St. 555; Pool v. Docker, 92 Ill. 501; Young v. Morgan, 9 Neb. 169; but see Wardlaw v. Wardlaw, 50 Ga. 544.

[2] Swaggerty v. Neilson, 8 Baxt. (Tenn.) 32; Lemon v. Phœnix etc. Ins. Co., 38 Conn. 294; Scholefield v. Templer, Johns. 155; East Ind. Co. v. Donald, 9 Ves. 275; East Ind. Co. v. Neave, 5 Id. 173.

[3] Gething v. Keighley, L. R., 9 Ch. D. 547; Stuart v. Sears, 119 Mass. 143; Russell v. The Church, 65 Pa. St. 9; McCrae v. Hollis, 4 Desau. 122; Mounin v. Beroujon, 51 Ala. 196; Barnett v. Barnett, 6 J. J. Marsh. 499; Waggoner v. Minter, 7 Id. 173.

[4] See *ante*, §§ 851, 869.

[5] See *ante*, § 776.

§ 882. III. Untruth of the statement.
§§ 883–889. IV. The intention, knowledge, or belief of the party making the statement.
§ 884. The knowledge and interest requisite at law.
§ 885. The knowledge or intention requisite in equity.
§§ 886–888. Six forms of fraudulent misrepresentations in equity.
§ 889. Requisites of a misrepresentation as a defense to the specific enforcement of contracts in equity.
§§ 890–897. V. Effect of the representation on the party to whom it is made.
§ 890. He must rely on it.
§ 891. He must be justified in relying on it.
§ 892. When he is or is not justified in relying on it.
§ 893. Information or means of obtaining information possessed by the parties receiving the representation.
§ 894. Knowledge possessed by him; patent defects.
§ 895. When the knowledge or information must be proved and not presumed.
§ 896. Words of general caution.
§ 897. Prompt disaffirmance necessary.
§ 898. VI. Materiality of the misrepresentation.
§ 899. Effects of a misrepresentation.
§§ 900–907. *Second.* Fraudulent concealments.
§ 901. General doctrine; duty to disclose.
§ 902. When duty to disclose exists.
§ 903. Concealments by a vendee.
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§ 915. Incidents of the jurisdiction and relief.
§ 916. The same; plaintiff *particeps doli;* ratification.
§ 917. The same; promptness; delay through ignorance of the fraud.
§ 918. Persons against whom relief is granted; *bona fide* purchasers.
§ 919. Particular instances of the jurisdiction; judgments; awards; fraudulent devises and bequests; preventing acts for the benefit of others; suppressing instruments.
§ 920. The same; appointment under powers; marital rights; trusts.
§ 921. The statute of frauds not an instrument for the accomplishment of fraud.

§ 872. **Objects and Purposes.**—Fraud, in some of its phases, has long been an occasion for the exercise of jurisdiction both at law and in equity. The various reliefs on the ground of fraud

which are possible from the nature of the legal and the equitable modes of procedure and remedies, are the following: At law (1) the affirmative relief of rescission, whereby the defrauded party is permitted to rescind the contract or other transaction—or, more accurately, to treat it as rescinded—to restore himself thereby to his original position of right, and by means of an appropriate action to recover back the money or other property of which he had been deprived, or which he had parted with; (2) the affirmative relief whereby the defrauded party suffers the transaction to stand, and by action recovers pecuniary damages as compensation for the injury sustained by him from the deceit; (3) defensive relief, whereby the party sets up the fraud as a defense, and thereby defeats any action brought to enforce the apparent fraudulent obligation. In equity (1) the affirmative relief of cancellation, whereby the defrauded party procures an instrument, obligation, transaction, or other matter affecting his rights and liabilities to be set aside and annulled, and himself to be restored to his original position of right, and as a consequence to re-establish his title, or to recover possession and enjoyment of property; (2) the affirmative relief of reformation by which a written instrument is corrected, and perhaps re-executed, when through fraud of the other party it failed to express the real relations which existed between the two parties; (3) the affirmative relief of a pecuniary recovery where the liability arose from the fraud of the other party, and no cancellation is necessary as the foundation of the recovery; (4) defensive relief, whereby the fraud is set up by way of defense to defeat any suit brought to enforce an apparent obligation or liability. In the discussions of the present and the following sections, I propose, in the first place, to describe the nature of fraud in equity, actual and constructive, to explain the essential elements entering into the conception of it, to define its kinds and classes, to enumerate its most important instances, and to show the various forms which it ordinarily assumes in the affairs of mankind. In the second place, I shall describe the equitable jurisdiction occasioned by fraud, define its extent and limits, explain the principles which regulate its exercise, and enumerate the important instances of its exercise, and the various reliefs, affirmative and defensive, which are thereby granted. The full treatment of some of these peculiar reliefs, such as cancellation and reformation, is postponed to a subsequent chapter. This discussion deals with fraud in equity, and will only refer incidentally, and by way of illustration, to fraud at law. Whatever amounts to

fraud, according to the legal conception, is also fraud in the equitable conception; but the converse of this statement is not true. The equitable theory of fraud is much more comprehensive than that of the law, and contains elements entirely different from any which enter into the legal notion.

§ 873. **Description: Essential Elements.**—It is utterly impossible to formulate any single statement which shall accurately define the equitable conception of fraud, and which shall contain all of the elements which enter into that conception; these elements are so various, so different under the different circumstances of equitable cognizance, so destitute of any common bond of unity, that they can not be brought within any general formula. To attempt such a definition would therefore be not only useless but actually misleading. It has been shown in a former chapter,[1] that the jurisdiction of chancery was originally rested upon two fundamental notions, equity and conscience, or good faith. The first of these embraced all cases where a party, acting according to the rules of the law, and not doing anything contrary to conscience or good faith, might obtain an *undue* advantage over another, which, though strictly legal, equity would not permit him to retain. The second embraced all those cases where a party, although perhaps still keeping within the limits of the strict law, so as to be sustained by the law courts, had committed some unconscientious act or breach of good faith, and had thereby obtained an undue advantage over another, which advantage, even though legal, equity would not suffer him to retain. The relief given by equity in *all* cases of fraud is plainly referable to this second head of the original jurisdiction. Every fraud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith in the broad meaning given to the term by equity—the *bona fides* of the Roman law. Furthermore, it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be *willful;* in other words, should be knowingly and intentionally done by the party; but it is not *essential* in the equitable notion, although it *is* in the legal, that there should be a knowledge of and an intention to obtain the *undue* advantage which results. The *willfulness* of the act or omission is the element which distinguishes fraud from other matters by which an undue advantage may be obtained so as to furnish an occa-

[1] Vol. 1, § 55.

sion for the equitable jurisdiction. Thus it has been shown that in accident, an occurrence *external* to the parties happens without any intent or other mental condition, and an undue advantage thereby accrues to one of them. In mistake there is indeed a mental condition or conviction of the understanding, but it wholly results from ignorance or misapprehension, and prevents the *free* action of the will; there is, therefore, a complete absence of willfulness or intention in the true and legal meaning of those terms. In all phases of fraud, on the other hand, there is a mental condition, a conviction of the understanding, a free operation of the will, and an intention to do or omit the very act by which the undue advantage is obtained. The following description is perhaps as complete and accurate as can be given so as to embrace all the varieties recognized by equity. Fraud in equity includes all willful or intentional acts, omissions, and concealments, which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained.[1]

§ 874. **Four Forms and Classes of Fraud in Equity.**— In the leading and celebrated case of Earl of Chesterfield v.

[1] This general statement, to which I have added the necessary terms "willful or intentional," is given slightly varied by Mr. Fonblanqué, 1 Fonb. Eq., bk. 1, ch. 2, § 3; adopted by Judge Story, 1 Eq. Jur., § 187, and by Mr. Kerr, Fraud & M., p. 42. It is plain that the definitions sometimes given by text-writers and judges, in which "artifice," "trick," "subterfuge," "circumvention," "cunning," and like terms are employed as necessary ingredients of fraud, are inaccurate and misleading when applied to the equitable conception; and are not even appropriate in describing fraud at law. It would also be very improper to include "an intent to deceive" as one of the essential elements of fraud in equity. The proposed civil code of New York gives the following definitions of fraud as affecting the entering into contracts (§§ 757, 758) which are adopted by the present civil code of California (§§ 1572, 1573). These definitions, in accordance with the plan of these codes, embrace both fraud in equity and at law. "Actual fraud, within the meaning of this chapter [*i. e.*, on contracts] consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, *or* to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact; 4. A promise made without any intention of performing it; 5. Any other act fitted to deceive."

"Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." These codes give a further and somewhat different definition of fraud or "deceit" as the ground of an obligation imposed by law, and of a legal action for damages. N. Y. Civ. Code, § 849; Cal. Civ. Code, § 1710.

Janssen, Lord Hardwicke, while not attempting to formulate any general definition, arranged all the forms of fraud, recognized by equity, in four classes; a division based upon their intrinsic qualities, and which has been followed by nearly all subsequent writers and judges. These classes are: (1) Frauds which are actual, arising from facts and circumstances of imposition; (2) Frauds apparent from the intrinsic nature and subject of the bargain itself; (3) Frauds presumed from the circumstances and condition of the parties; (4) Frauds which are an imposition and deceit on third persons not parties to the transaction.[1] In pursuance of the order which seems to be simple and natural, I shall include and treat under the description of actual fraud, those cases only which belong to the first of these four classes. In all of them, and this seems to be the essential distinction between actual and constructive fraud, there is the element of falsity in fact, and the knowledge of the falsity and the intention to deceive in a *modified and partial* manner at least, in equity no less than in the law. In the three other classes there is no *necessary* element of falsity in fact, and the fraud in each of them arises rather from motives of expediency and policy than from any intent of the parties.[2]

[1] Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125; 1 Atk. 301; 1 Eq. Lead. Cas. 773 (4th Am. ed.) In his most instructive opinion, Lord Hardwicke said upon this particular subject: "This court has an undoubted jurisdiction to relieve against every species of fraud. *First*, then, fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. *Secondly*, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other, which are unequitable and unconscientious bargains. *A third* kind of fraud is that which may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that it must be proved not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another which knowingly to do is equally against conscience as to take advantage of his ignorance. *A fourth* kind of fraud may be collected or inferred, in the consideration of this court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. It may sound odd that an agreement may be infected by being a deceit on others not parties; but such there are, and against such there has been relief. Of this kind have been marriage brokerage contracts, neither of the parties therein being deceived; but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend." [He adds some further illustrations and explanations of this fourth class, and then says:] "The last head of fraud on which there has been relief is that which infects catching bargains with heirs, reversioners, or expectants, in the life of their fathers. These have generally been mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive." Lord Hardwicke plainly does not intend in this last instance to add a fifth and distinct class; he is simply giving a special instance or form, which may fall wholly or partly into one or more of the four preceding classes.

[2] The following extract shows the opinion of one of the ablest of modern

§ 875. **Nature of Actual Fraud.**—Although it is not possible to give any complete definition of fraud, yet it is possible to describe the various elements which are essential to the conception of actual fraud. In the vast majority of instances actual fraud occurs in negotiations or dealings which are incidents of some agreement executed or executory. Even in transactions which are not agreements, such as the execution of a will, the operation and effect of fraud are the same as in the case of agreements. There are undoubtedly some special transactions capable of being affected by fraud, which can not readily be brought within this general description—as, for example, the fraudulent obtaining of a judgment at law. These special cases will be considered by themselves. With all these varieties of external form, actual fraud in the numberless agreements, transactions, and dealings of mankind may, in its intrinsic nature, be reduced to two essential forms, false repre-

equity judges, concerning the difference between "actual fraud" in equity as well as at law, and constructive fraud. In Smallcombe's Case, L. R., 3 Eq. 769, 771, Lord Romilly said: "I must say, that to treat such a transaction as a fraud, is, in my opinion, to confound moral principles and to introduce an element of great confusion into the doctrine of courts of equity, the fundamental principle of which, as regards fraud, is, as it appears to me, that nothing can be called fraud, and nothing can be treated as fraud, except an act which involves *grave moral guilt*. I feel strongly, and I have frequently endeavored to point out the injurious consequence of allowing such expressions to be used as 'equitable fraud,' or 'that which courts of equity call fraud,' or 'constructive fraud,' when in fact no act has been done by any one which involves moral culpability. The only exception that I am aware of is, that the phrase 'constructive fraud' has sometimes been applied to cases where an innocent partner has been made liable for the fraudulent acts of his copartner. The expression is not a proper one even there, because the innocent party has been guilty of no fraud, but he is in many cases properly made liable for, and compelled to redress, the wrong committed by his really fraudulent copartner." It should be observed that this opinion of Lord Romilly is opposed to that of very many equally able judges, and in one important particular it conflicts with direct decisions. It is finally settled that at law there can be no fraud without moral culpability; but in equity even actual fraud may exist without the knowledge and wrongful intent which constitute the immorality at law. Furthermore, the phrase "constructive fraud," or "equitable fraud," has been constantly used by courts from the earliest day; and it would produce great confusion to refuse the name "fraud" to those acts which have hitherto constituted constructive fraud, and to describe them by some other term. The settled terminology of the law is one of its most important features. Although this division is not followed by all writers—*e. g.*, Story and Snell—yet "actual" and "constructive" in equity are separated by a very clear and certain line. The *essential* fact in actual fraud is *untruth*. In the law it must be willful—a falsehood; in equity it may be but is not necessarily willful. In constructive fraud there is no necessary untruth. The equitable conception of constructive fraud embraces a great variety of transactions; some are absolutely void from illegality, others are voidable, others still simply have a presumption against their validity, and require affirmative proof of their fairness. In constructive fraud the invalidity arises from general motives of policy, good morals, and fair dealing, and not from the fact of untruth.

See next §§ 922

sentation and fraudulent concealments—*suggestio falsi* and *suppressio veri*. The discussion of actual fraud mainly consists, therefore, in analyzing these two forms and in detemining their necessary constituents.

§ 876. **First. Misrepresentations.**—A misrepresentation, in order to constitute fraud, must contain the following essential elements: (1) Its form as a statement of fact; (2) Its purpose of inducing the other party to act; (3) Its untruth; (4) The knowledge or belief of the party making it; (5) The belief, trust, and reliance of the one to whom it is made; (6) Its materiality. These elements will be examined separately.

§ 877. **I. The Form: An Affirmation of Fact.**—A misrepresentation must be an affirmative statement or affirmation of some fact, in contradistinction to a concealment or failure to disclose, and to a mere expression of opinion.[1] In the great majority of instances it is made by means of language written or spoken; but it may consist of conduct alone, of external acts, when, through this instrumentality, it is intended to convey the impression, or to produce the conviction, that some fact exists, and such result is a natural consequence of the acts.[2]

[1] In Jennings v. Broughton, 5 De G. M. & G. 125; 17 Beav. 234, which was brought to set aside the sale of shares in a certain mine on account of misrepresentations by the vendors, Knight Bruce, L. J., stating the requisites of a misrepresentation, said (p. 130): "First, in the statements or representations concerning the mine, was there any untrue assertion material in its nature, that is to say, which, taken as true, added substantially to the value or promise of the mine, and was not evidently conjectural merely?" Doggett v. Emerson, 3 Story, 700; Hough v. Richardson, 3 Id. 659; Daniel v. Mitchell, 1 Id. 172; Warner v. Daniels, 1 Wood. & M. 90; Hammatt v. Emerson, 27 Me. 308; Stone v. Denny, 4 Met. 151; Hazard v. Irwin, 18 Pick. 95; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216, Verplanck v. Van Buren, 76 Id. 247; Dambmann v. Schulting, 75 Id. 55, 61; Beardsley v. Duntley, 69 Id. 577; Perkins v. Partridge, 30 N. J. Eq. 82; Leutz v. Earnnart, 12 Heisk. 711; Derrick v. Lamar Ins. Co., 74 Ill. 404; McShane v. Hazlehurst, 50 Md. 107; Cowles v. Watson, 14 Hun. 41; Slaughter's Adm'r v. Gerson, 13 Wall. 379; McAleer v. Horsey, 35 Md. 439; Printup v. Fort, 40 Geo. 276; Bowman v. Caruthers, 40 Ind. 90; Babcock v. Case, 61 Pa. St. 427; Thorn v. Helmer, 4 Abb. App. Dec. 408; Morris Canal Co. v. Emmett, 9 Paige, 168; Stebbins v. Eddy, 4 Mason, 414; Winston v. Gwathmey, 8 B. Mon. 19; Suessenguth v. Bingenheimer, 40 Wisc. 370; Gifford v. Carvill, 20 Cal. 589; Pike v. Fay, 101 Mass. 134, 137; Cooper v. Lovering, 106 Id. 77, 79; Taylor v. Fleet, 1 Barb. 471; Oberlander v. Spiess, 45 N. Y. 175; New Brunswick etc. Ry. v. Conybeare, 9 H. L. Cas. 711; 1 De G. F. & J. 578; Attwood v. Small, 6 Cl. & Fin. 232; Lowndes v. Lane, 2 Cox, 363; Winch v. Winchester, 1 V. & B. 375.

[2] It was so held in Lovell v. Hicks, 2 Y. & C. Exch. 46, where fictitious and fraudulent experiments were performed, so as to induce a party to enter into a contract concerning a patent right. See, also, Crawshay v. Thompson, 4 M. & G. 357, 387; McCall v. Davis, 56 Pa. St. (6 P. F. Sm.) 431. The point is also illustrated by Denny v. Hancock, L. R., 6 Ch. 1, although the decision was rested upon misdescription rather than fraudulent misrepresentation. A purchaser was so misled as to their boundaries by the appearance of the grounds, that the contract was not enforced. This was,

A misrepresentation of the law is not considered as amounting to fraud, because, as it is generally said, all persons are presumed to know the law; and it might perhaps be added, that such a statement would rather be the expression of an opinion than the assertion of a fact.[1] A statement of intention *merely* can not be a misrepresentation amounting to fraud, since such a statement is not the affirmation of any external fact, but is at most only an assertion that a present mental condition or opinion exists.[2] That the *fact*, however, concerning which the statement is made, in future, does not of itself prevent the misrepresentation from being fraudulent. The statement of matter in the future, if affirmed *as a fact*, may amount to a fraudulent misrepresentation, as well as a statement of a fact as existing at present.[3]

of course, a mistake of his; but the mistake consisted of his obtaining from the appearance an impression which was natural, but was at the same time contrary to the real fact; the appearance thus operated as a misdescription. When two parties have made an agreement, and in reducing it to writing, one of them knowingly alters it in a material manner, and procures the other to execute or to accept the writing in ignorance of the alteration, this conduct is fraud. Kilmer v. Smith, 77 N. Y. 226; Hay v. Star Ins. Co., 77 Id. 235; Rider v. Powell, 28 Id. 310.

[1] Eaglesfield v. Marquis of Londonderry, L. R., 4 Ch. D. 693; Rashdall v. Ford, L. R., 2 Eq. 750, 754; Upton v. Tribilcock, 1 Otto, 45; Grant v. Grant, 56 Me. 573; Reed v. Sidener, 32 Ind. 373; Drake v. Latham, 50 Ill. 270; Fish v. Cleland, 33 Ill. 238, 243; Stbt. Belfast v. Boon, 41 Ala. 50, 68; Smither v. Calvert, 44 Ind. 242; Upton v. Englehart, 3 Dill. 496; People v. San Francisco, 27 Cal. 655; Jordan v. Stevens, 51 Me. 78. It has been shown in the preceding section, that when a party has been led to act in ignorance or mistake of the law through the inequitable conduct of another, he may be relieved on the ground of *mistake;* see *ante*, § 847.

[2] Citizens' B'k v. First Nat. B'k of N. O., L. R., 6 H. L. 352; Jorden v. Money, 5 H. L. Cas. 185; Long v. Woodman, 58 Me. 49; Grove v. Hodges, 55 Pa. St. (5 P. F. Sm.) 504, 519.

It must not be understood that no rights would flow from such a statement. A representation of a future intention, absolute in form, deliberately made for the purpose of influencing the conduct of the other party, and then acted upon by him, is generally the source of a right, and may amount to a contract, enforceable as such by a court of equity. See De Beil v. Thomson, 3 Beav. 469; 12 Cl. & Fin. 61 n; Hammersley v. De Biel, Id. 45; Bold v. Hutchinson, 20 Beav. 250; 5 De G. M. & G. 558; Neville v. Wilkinson, 1 Bro. Ch. 543; Money v. Jordan, 2 De G. M. & G. 318, 332, *per* Lord Cranworth; Ainslie v. Medlycott, 9 Ves. 13, 21 *per* Sir Wm. Grant; Jameson v. Stein, 21 Beav. 5; Gale v. Lindo, 1 Vern. 475; Scott v. Scott, 1 Cox, 366; Maunsell v. White, 4 H. L. Cas. 1039, 1056, *per* Lord Cranworth; 1 Jo. & Lat. 539, 557; Loxley v. Heath, 27 Beav. 523; 1 De G. F. & J. 489; Moore v. Hart, 1 Vern. 110, 201; Luders v. Anstey, 4 Ves. 501; 5 Id. 213; Saunders v. Cramer, 3 Dr. & War. 87; Montgomery v. Reilly, 1 Bligh (N. S.) 364; Payne v. Mortimer, 1 Giff. 118; 4 De G. & J. 447; Skidmore v. Bradford, L. R., 8 Eq. 134. Moorhouse v. Colvin, 15 Beav. 341; Caton v. Caton, L. R., 2 H. L. 127, 142.

[3] Piggott v. Stratton, 1 De G. F. & J., 33, 49, *per* Lord Ch. Campbell, who says the doctrine is "well established, that if A. deliberately makes an assertion to B., intending it to be acted upon by B., and it is acted upon by B., A. is estopped from saying that it is not true. If it turns out to be false, A. is answerable for the damage which may have accrued to B., and B. is entitled, in respect of any-

§ 878. **Misrepresentations of Matter of Opinion.**—Since the very corner-stone of the doctrine is, that the statement must be an affirmation of a fact, it has sometimes been said, but very incorrectly, that a misrepresentation can not be made of a matter of opinion. The true rule is that a fraudulent misrepresentation can not itself be the *mere expression of an opinion* held by the party making it. The reason is very simple; while the person addressed has a right to rely on any assertion of a fact, he has no right to rely upon the mere expression of an opinion held by the party addressing him, in whatever language such expression be made; he is assumed to be equally able to form his own opinion, and to come to a correct judgment in respect to the matter, as the party with whom he is dealing; and can not justly claim, therefore, to have been misled by the opinion, however erroneous it may have been.[1] For this reason the *general* praise of his own wares by a seller, commonly called "puffing," for the purpose of enhancing them in the buyer's estimation, has always been allowed provided it is kept within reasonable limits; that is, provided the praise is general, and the language is not the positive affirmation of a *specific* fact affecting the quality, so as to be an express warranty, and is not the intentional assertion of a *specific* and material fact, known to the party to be false, so as to be a fraudulent misrepresentation.[2] The foregoing

thing done in the belief that it was true, to object to any denial of its truth by A.:" Hutton v. Rossiter, 7 De G. M. & G., 9, 22, 23; Hawes v. Marchant, 1 Curtis, 136; Lobdell v. Baker, 3 Met. 469; Osgood v. Nichols, 5 Gray, 420; Audenried v. Betteley, 5 Allen, 384; Plumer v. Lord, 9 Allen, 455; Kimball v. Ætna Ins. Co., 9 Id. 540; Langdon v. Doud, 10 Id. 433, 437; Andrews v. Lyons, 11 Id. 349; Turner v. Coffin, 12 Id. 401; Fall Riv. Nat. Bk. v. Buffington, 97 Mass. 498; Vibbard v. Roderick, 51 Barb. 616; Brookman v. Metcalf, 4 Rob. (N. Y.) 568; Vanderpool v. Brake, 28 Ind. 130; Ridgway v. Morrison, Id. 201; Davidson v. Young, 38 Ill. 145; Chouteau v. Goddin, 30 Mo. 229, and cases in last note. Some of these cases may be referred to the doctrine of equitable estoppel; but it is plain that where the representation is that of a *fact* in the future, *and not a mere promise*, and it is relied upon, and turns out to be false, the rights and remedies of the injured party are the same as those which arise from the fraudulent misrepresentation of an *existing* fact. There is nothing inconsistent in this result, with the rule that no equitable estoppel arises from a *mere* promise.

[1] Jennings v. Broughton, 5 De G. M. & G., 125; Mead v. Bunn, 32 N. Y. 275; Sawyer v. Prickett, 19 Wall. 146; Hepburn v. Dunlop, 1 Wheat. 189; Hazard v. Irwin, 18 Pick. 95, 105; Watts v. Cummins, 59 Pa. St. (9 P. F. Sm.) 84; Curry v. Keyser, 30 Ind. 214; Sieveking v. Litzler, 31 Ind. 13, 17; Stow v. Bozeman, 29 Ala. 397; Hubbell v. Meigs, 50 N. Y. 480, 489; Banta v. Savage, 12 Nev. 151; Coil v. Pittsburg F. Coll., 40 Pa. St. 439, 445; Pike v. Fay, 101 Mass. 134; Mooney v. Miller, 102 Id. 217; Cooper v. Lovering, 106 Id. 77, 79; Gifford v. Carvill, 29 Cal. 589; Suessenguth v. Bingenheimer, 40 Wisc. 370; Speiglemyer v. Crawford, 6 Paige, 254; Wambaugh v. Bimer, 25 Ind. 368; Juzan v. Toulman, 9 Ala. 662; Glasscock v. Minor, 11 Mo. 655; Smith v. Richards, 13 Pet. 26; Hough v. Richardson, 3 Story, 659; Warner v. Daniels, 1 Wood. & Min. 90.

[2] French v. Griffin, 18 N. J. Eq. (3 C. E. Green), 279; Hunter v. McLaughlin, 43 Ind. 38.

rule as to expressions of opinion, can not be pushed beyond the plain reasons upon which it rests. Wherever the statement, although relating to matter of opinion, is the affirmation *of a fact*, it may be a fraudulent representation. Such an affirmation might be made in several forms. The very fact concerning which the statement is made, may be the existence of an opinion. The existence of an opinion may be a fact material to the proposed transaction; and a statement that such an opinion exists, becomes an affirmation of a material fact, and if untrue, it is a misrepresentation. The opinion might either be represented as held by a third person, or as held by the very party making the statement. As a single illustration, either the third person or the party himself might be an expert, and their opinion might be material, so that the representation that the opinion was held might be the affirmation of a most material fact. There is still another and perhaps more common form of such misrepresentation. Wherever a party states a matter, which might otherwise be only an opinion, and does not state it *as the mere expression of his own opinion*, but affirms it *as an existing fact* material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation. The statements which most frequently come within this branch of the rule, are those concerning value. The foregoing distinctions which I have attempted to explain, and which have sometimes been lost sight of, will go far, I think, to harmonize whatever apparent conflict of decision may be found in some of the reported cases.[1]

[1] It can not be denied that there is apparently a direct conflict of decision upon the effect of representations concerning value. The distinctions drawn in the text seem to me to be in perfect accordance with principle, and to be just and practical, and they will tend to remove most of the conflict which is apparent rather than real. Statements of value are sometimes nothing more than the expression of the party's own opinion; and there is a group of decisions in which they are so treated. On the other hand, statements of value may be affirmations of a specific material fact; and there is a group of decisions in which they are so treated, and held to be fraudulent misrepresentations. There is no necessary conflict between these two groups of decisions; although the language of the judicial opinions has not always recognized and preserved the distinction between the two forms. Haygarth v. Wearing, L. R., 12 Eq. 320, 327, 328, is directly in point, and sustains the distinctions stated in the text in the fullest manner. The plaintiff had inherited a piece of land. She was completely ignorant concerning it and its value; the defendant was well acquainted with it and with its value. He stated to her that it was not worth more than £100, and she therefore sold and conveyed to him for that sum. It was really worth £500, which the defendant well knew. The suit is brought to set aside the sale and to recover the land; and the relief was granted, although the objection was strongly

§ 879. **II. The Purpose for which the Representation is Made.**—It is an essential requisite, both in equity and at law, that the representation, whatever be its form, must be made for the purpose and with the design of procuring the other party to act, of inducing him to enter into the contract, or engage in the transaction.[1] It must therefore be, of necessity,

urged that such a representation was merely a matter of opinion. The court first decided that no fiduciary relation existed between the two parties, so that the case must depend upon general rules applicable alike to all persons dealing with each other. V. C. Wickens said: "Independently of any fiduciary relation, this court holds that a person obtaining a conveyance of real estate on the faith of certain representations which are afterwards shown to be untrue, must submit to have the conveyance treated as fraudulent and void against the person deceived. In this case, the representation that he made to her was, that the value of what she had to sell was about £100. This was not a mere purchaser's assessment [*i. e.*, estimate or opinion], but a deliberate statement made to her by a person having full knowledge, which statement was asked by her for her guidance in the transaction, and was acted upon by her in reliance on its good faith and honesty." See also Turner v. Harvey, 1 Jac. 169, 178, 179; Rawlins v. Wickham, 3 De G. & J. 304; 1 Giff. 355 (a misrepresentation as to amount of indebtedness); Martin v. Jordan, 60 Me. 531; Coon v. Atwell, 46 N. H. 510; Simar v. Canaday, 53 N. Y. 298; Van Epps v. Harrison, 5 Hill, 63; McAleer v. Horsey, 35 Md. 439; Reid v. Flippen, 47 Ga. 273; Morehead v. Eades, 3 Bush, 121; Sieveking v. Litzler, 31 Ind. 17; Harvey v. Smith, 17 Id. 272; Davis v. Jackson, 22 Id. 233; McFadden v. Robison, 35 Id. 24; Allin v. Mihison, 72 Ill. 201; Neil v. Cummings, 75 Id. 170; Faribault v. Sater, 13 Minn. 223; Gifford v. Carvill, 29 Cal. 589; Cruess v. Fessler, 39 Id. 336.

It has been held that statements as to the cost of property can not be fraudulent misrepresentations, entitling the injured party to a rescission, if no fiduciary relation existed. Cooper v. Lovering, 106 Mass. 77, 79; Mooney v. Miller, 102 Id. 217, 220; Hemmer v. Cooper, 8 Allen, 334; Tuck v. Downing, 76 Ill. 71; Noetling v. Wright, 72 Id. 390; Holbrook v. Connor, 60 Me. 578. In this last case, Mr. Justice Dickerson dissented, holding what is, as it seems to me, the more accurate and reasonable doctrine. In Cowles v. Watson, 14 Hun, 41, a representation that property cost $500,000, when it only cost half that amount, was held a statement of fact and not a mere opinion. In the following cases, statements involving value were held representations of fact, and not mere expressions of opinion. Jordan v. Volkenning, 72 N. Y. 300, 306 (a gross exaggeration of value); Perkins Partridge, 30 N. J. Eq. 82; Leutz v. Earnhart, 12 Heisk. 711; Derrick v. Lamar Ins. Co., 74 Ill. 404; Foxworth v. Bullock, 44 Miss. 457; but see Suessenguth v. Bingenheimer, 40 Wisc. 370. With respect to matters of opinion stated as facts, or stated as a fact to be held by a certain person, see Haygarth v. Wearing, L. R., 12 Eq. 320; Attwood v. Small, 6 Cl. & Fin. 232; Wakeman v. Dalley, 51 N. Y. 27; Shaeffer v. Sleade, 7 Blackf. 178. In Schramm v. O'Connor, 98 Ill. 539, a mere exaggeration of the value and excellence of land was held matter of opinion only.

[1] Rawlins v. Wickham, 3 De G. & J. 304; Jennings v. Broughton, 5 De G. M. & G. 126, 130; Reynell v. Sprye, 1 Id. 660; Western B'k v. Addie, L. R., 1 Sc. App. 145; West v. Jones, 1 Sim., N. S., 205, 208; Traill v. Baring, 4 De G. J. & S. 318, 326, 329; Attwood v. Small, 6 Cl. & Fin. 232; Att'y-Gen. v. Ray, L. R., 9 Ch. 397; Hill v. Lane, L. R., 11 Eq. 215, 219; Eaton C. & B. Co. v. Avery, 83 N. Y. 31; Rohrschneider v. Knickerbocker Ins. Co., 76 Id. 216; Verplank v. Van Buren, Id. 247; Smith v. Richards, 13 Pet. 26; Tyler v. Black, 13 How. (U. S.) 230; Hough v. Richardson, 3 Story, 659; Smith v. Babcock, 2 Wood. & Min. 246; Pratt v. Philbrook, 33 Me. 17; Harding v. Randall, 15 Me. 332; Hunt v. Moore, 2 Barr. 103; Joice v. Taylor, 6 Gill & J. 54; McAleer v. Horsey, 35 Md. 439; Taymon v. Mitchell, 1 Md. Ch. 496; Lanier v. Hill,

preliminary to the actual conclusion of the transaction, and in the great majority of instances it is made during and forms a part of a negotiation between the parties, which terminates in the contract or other transaction.[1] There are, however, very important exceptions to this general statement. There are cases where the misrepresentations can not be said to form a part of any negotiation or treaty between the parties. The false statements may be made with the design that they should be acted upon by some one, but without any design or knowledge of their being acted upon by any particular person. For example, it is now well settled that prospectuses issued by promoters or directors of companies, reports or circulars and similar publications addressed to all whom it may concern, may be fraudulent misrepresentations giving rise to any appropriate equitable or even legal relief.[2] Such being the object of the representation, it must relate to and be directly connected with the very contract or other transaction in question; must deal with its subject-matter or other material terms, and not be confined to other and distinct relations, transactions, or matters in which the parties are concerned. In the language of an eminent judge, a misrepresentation concerning any subject-matter "must be material in its nature, that is to say, one which, taken as true, would add substantially to the value or promise of" that subject-matter.[3]

§ 880. **Presumption of the Design to Induce Action.**—In order that a statement may be a fraudulent misrepresentation, the party making it need not have any malignant feeling towards the other, nor any desire to injure, nor need he be actuated by any corrupt or wicked motive; for equity looks at the relations of the statement towards the real facts, and the results which

25 Ala. 554; Smith v. Robertson, 23 Id. 312; Oswald v. McGehee, 28 Miss. 340; Slaughter's Adm'r v. Gerson, 13 Wall. 379; Bowman v. Caruthers, 40 Ind. 90.

[1] Harris v. Kemble, 1 Sim. 111, 122, *per* Sir John Leach.

[2] The leading case is Kisch v. Cent. Ry. of Venezuela, 3 De G. J. & S. 122; L. R., 2 H. L. 99. See also, Barrett's Case, 3 De G. J. & S. 30; Reese River Min. Co. v. Smith, L. R., 4 H. L. 64; Smith's Case, L. R., 2 Ch. 604; Ross v. Estates Invest. Co., L. R., 3 Ch. 682; Hallows v. Fernie, L. R., 3 Ch. 467, 475; New Brunswick etc. Ry. v. Muggeridge, 1 Dr. & Sm. 363; Peek v. Gurney, L. R., 6 H. L. 377; Swift v. Winterbotham, L. R., 8 Q. B. 244; Paddock v. Fletcher, 42 Vt. 389; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216; Phelps v. Wait, 30 N. Y. 78; Bruff v. Mali, 36 N. Y. 200; McClellan v. Scott, 24 Wisc. 81. The relief may be a rescission of the purchase made by the defrauded person, or any other proper equitable remedy, or a recovery of damages at law from the fraudulent directors, officers, or promoters. This subject is more fully examined *post*, § 881.

[3] Jennings v. Broughton, 5 De G. M. & G. 126; 130 *per* Knight Bruce, L. J; Harris v. Kemble, 1 Sim. 111.

will naturally flow from it, rather than at the mental condition, temper, and feelings of the person who makes it.[1] If, therefore, a representation made prior to the transaction, and directly relating to it, is of such a character that it would naturally and reasonably induce, or tend to induce, any ordinary person to act upon it and enter into the contract, or engage in the transaction, and is in fact followed by such action on the part of the other person, then it will be presumed that it was made for the purpose and with the design of inducing that person to do what he has done—that is, to enter into the agreement, or engage in the transaction. The design will be inferred from the natural and necessary consequences.[2] It is not necessary that all the repre-

[1] Traill v. Baring, 4 De G. J. & S. 318, 326, 328; Gibson v. D'Este, 2 Y. & C. Ch. 542; Wilde v. Gibson, 1 H. L. Cas. 605.

[2] Traill v. Baring, 4 De G. J. & S. 318, 326, 328; Jennings v. Broughton, 5 De G. M. & G. 126, 130; Rawlins v. Wickham, 3 De G. & J. 304; Reynell v. Sprye, 1 De G. M. & G. 660, 708–710; Wilson v. Short, 6 Hare, 366, 377; Conybeare v. New Brunswick etc. Co., 1 De G. F. & J. 578; 9 H. L. Cas. 711; Attwood v. Small, 6 Cl. & Fin. 232; West v. Jones, 1 Sim., N. S., 205; Aberaman Iron Works v. Wickens, L. R., 4 Ch. 101; 5 Eq. 485; Leyland v. Illingworth, 2 De G. F. & J. 248; Western B'k of Scotland v. Addie, L. R., 1 H. L. Sc. App. 145; Torrance v. Bolton, Id., 8 Ch. 118; 14 Eq. 124, is a very illustrative case of the effect of misrepresentations in equity. A vendee was misled by a wrong description of the property sold. The description was held to be misleading; that the *onus* was on the vendor to show that *the purchaser was not misled;* that an actual fraudulent intent—an intent to deceive—was not necessary to set aside a contract of sale; it is enough that such contract is unconscientious. The case of National Exch. Co. v. Drew, 2 McQueen, 103, contains a very full and instructive discussion of fraud. The company sued defendants to recover a sum of money which it had advanced to enable them to purchase stocks of the company. Defendants set up false representations by which they were induced to make the purchase. The House of Lords held that the loan and the purchase formed one transaction, and the fraud vitiated the whole. The case of Reynell v. Sprye, *supra*, illustrates in the clearest manner the *principles* of equity in dealing with fraud. I quote a passage from the opinion of Cranworth, L. J., which bears not only upon the element now under consideration—the purpose of inducing the other person to act—but also upon the more difficult question of the knowledge and intent to mislead of the one making the statement. He says (p. 708): "Once make out that there has been anything like deception, and no contract resting in any degree on that foundation can stand. It is impossible so to analyze the operations of the human mind as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No one can do this with certainty even as to himself, still less as to another. Where certain statements have been made, *all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular line of conduct,* it is impossible to say of any one such representation so made, that even if it had not been made, the same resolution would have been taken, or the same conduct followed. Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue, the whole contract is considered in this court as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed? The case is not at all varied by the circumstance that the untrue representation, or any of the untrue represen-

sentations by which a party is induced to act, should be untrue. The cases hold that where certain statements have been made all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular line of conduct, and any one of them is untrue, the whole contract or other transaction is considered as having been obtained fraudulently; the court can not discriminate among the different statements, nor say that the untrue representation is not the very one which induced the party to act. The foregoing general proposition, that it is sufficient if the statement is of such a character as would naturally induce any ordinary person to enter upon a particular line of conduct, and is actually followed by such conduct, is the *practical* rule by which the courts determine whether a misrepresentation possesses the particular element of fraud—the purpose or design—now under consideration.[1]

§ 881. **False Prospectuses, Reports, Circulars, and the Like.**—The nature of fraudulent misrepresentations, their requisite element of being designed and naturally operating to induce third persons to act, and other important features, are so fully illustrated by the rules concerning the effect of prospectuses, circulars, reports, and other similar documents, issued by the promoters, directors, or officers of corporations, as established by very recent decisions, that a brief statement of these rules may be proper. I do not intend at present to consider the general subject of the relations subsisting between corporations, or their directors, or officers on the one side, and stockholders, creditors, or third persons dealing with them on the other, but simply to give the conclusions which have been settled by the courts concerning the effect of such documents, published by or in the name of the company, addressed to all

tations, may in the first instance have been the result of innocent error. If, after the error has been discovered, the party who has innocently made the incorrect representation, suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this court, a fraudulent misrepresentation, even though it was not so originally. These are all principles of such obvious justice as to require neither argument nor authority to illustrate and enforce them, and they need but to be stated, in order to command immediate assent. The only question can be in each particular case, how far the facts bring it within the principle." Nicol's Case, 3 De G. & J. 387, *per* Lord Chan. Chelmsford and L. J. Turner. See, also, Taylor v. Fleet, 1 Barb. 471; Wells v. Millett, 23 Wisc. 64; Eaton etc. Co. v. Avery, 83 N. Y. 31; Rohrschneider v. Knickerbocker Ins. Co., 76 Id. 216.

[1] It may be observed that the two requisite elements of a fraudulent misrepresentation which have been examined—that the representation must be an affirmation of fact, and the design of inducing the other party to act—are recognized and adopted alike by courts of law and of equity; decisions at law may therefore be properly cited to illustrate these two requisites in equity.

whom they may concern, which have misled third persons, and induced them to purchase shares of stock in the corporation. These conclusions can not be better expressed than in the very language which has been used by eminent judges: "Those who issue a prospectus, holding out to the public the great advantages which accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating *as fact* that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges or advantages which the prospectus holds out as inducements to take shares."[1] While *mere* exaggerated views of the prospects and advantages of the company contained in a prospectus, circular, or report, might not be fraudulent, still all statements should be fair, *bona fide*, and honest.[2] "If it can be shown that a material representation which is not true is contained in the prospectus, or in *any* document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be released from that contract, the courts are bound to relieve him from it. Contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals."[3] It is settled, therefore, that a person who has been induced by the misrepresentations of such documents to purchase shares of stock or to enter into a contract with the company for their purchase, may, if he acts without delay upon learning the truth, obtain relief against the company, either by being struck off from the list of stockholders and contributaries in the proceeding instituted for its winding up and final settlement, or by means of an equitable suit brought against the company for the purpose of rescinding his purchase of shares, and of recovering back the money which he paid for them. He may even, in a proper case, obtain relief against the fraudulent directors personally, by means of an equitable suit for an accounting and re-

[1] New Brunswick etc. Ry. v. Muggeridge, 1 Dr. & Sm. 363, 381, *per* Kindersley, V. C.; Cent. Ry. of Venezuela v. Kisch, L. R., 2 H. L. 99, 113, *per* Lord Chelmsford; Henderson v. Lacon, Id., 5 Eq. 249, 263, *per* Lord Hatherley.

[2] Kisch v. Cent. Ry. of Venezuela, 3 De G. J. & S. 122, 135, *per* Turner, L. J.; Denton v. Macneil, L. R., 2 Eq. 352.

[3] *In re* Reese River Min. Co., L. R., 2 Ch. 604, 609, *per* Turner, L. J.

payment of the money; or by means of an action at law for the recovery of damages on account of the deceit.[1] Relief against the directors personally requires a much stronger case of fraud, than relief against the company. The purchase of shares may be set aside, and the purchaser relieved from his liability as a contributory, without any knowledge of the untruth on the part of those who issued the document. Recovery from the directors personally requires knowledge of the untruth on their part, or else that the statement should be made under such circumstances that knowledge will be imputed to them.[2] It is also settled that the stockholder must take the requisite proceedings to be relieved against the company at once upon his discovery of the truth; any unreasonable delay, and any act on his part tending to show acquiescence, will debar him of relief.[3]

[1] Kisch v. Cent. Ry. of Venezuela, 3 De G. J. & S. 122; Cent. Ry. etc. v. Kisch, L. R., 2 H. L. 99; Reese River M. Co. v. Smith, L. R., 4 H. L. 64; New Sombrero etc. Co. v. Erlanger, L. R., 5 Ch. D. 73; *In re* Hereford etc. Co., Id., 2 Ch. D. 621; *In re* Coal Gas Co., Id., 1 Ch. D. 182; *In re* London etc. Bk., L. R., 7 Ch. 55; *In re* Estates Investment Co., Id., 4 Ch. 497; Ross v. Estates Invest. Co., Id., 3 Ch. 682; 3 Eq. 122; *In re* Reese River M. Co., Id., 2 Ch. 604; Peek v. Gurney, L. R., 13 Eq. 79; Hill v. Lane, Id., 11 Eq. 215; McNiell's Case, Id., 10 Eq. 503; Kent v. Freehold etc. Co., Id., 4 Eq. 588; Smith v. Reese R. M. Co., Id., 2 Eq. 264; Rohrschneider v. Knickerbocker Ins. Co., 76 N. Y. 216. In the following cases relief was refused on the ground that the representations were not fraudulent, since they were either mere estimates of value in a business which was well known to be very hazardous, or even ambiguous, or were simply exaggerations: *In re* Mercantile Trading Co., L. R., 4 Ch. 475; Hallows v. Fernie, L. R., 3 Ch. 467, 475; 3 Eq. 520; *In re* Coal Co., Id., 20 Eq. 114; Ship v. Crosskill, Id., 10 Eq. 73, 82, 83; Heymann v. European etc. Ry., Id., 7 Eq. 154; Denton v. Macneil, Id., 2 Eq. 352. The misrepresentation must be the *proximate* cause of the purchase of the shares. Barrett's Case, 3 De G. J. & S. 30.

[2] Hill v. Lane, L. R., 11 Eq. 215; Peek v. Gurney, Id. 13 Eq. 79; 6 H. L. 377; Ship v. Crosskill, Id., 10 Eq. 73, 82, 83; Henderson v. Lacon, Id., 5 Eq. 249; Cargill v. Bower, Id., 10 Ch. D. 502. For examples of actions at law, see Swift v. Winterbotham, L. R., 8 Q. B. 244; Bagshaw v. Seymour, 4 C. B., N. S., 873; Clarke v. Dickson, 6 Id. 453.

The rule is settled in England, that a director of a corporation is not liable for the fraud of co-directors or other officers or agents—*e. g.* in false prospectuses—unless he has either expressly authorized or tacitly permitted its commission: Cargill v. Bower, L. R., 10 Ch. D. 502, following Weir v. Barnett, Id., 3 Exch. Div. 32; S. C. on appeal, Id., 3 Exch. Div. 238, and holding that Peek v. Gurney, Id., 6 H. L. 377, is not opposed to this view.

[3] The decisions require promptness on his part. In one of the cases a delay of three months after learning the facts was held fatal. Sharpley v. Louth etc. Ry., L. R., 2 Ch. D. 663; Smith's Case, Id., 2 Ch. 604; Peek v. Gurney, Id., 13 Eq. 79; Ashley's Case, Id., 9 Eq. 263; Scholey v. Cent. Ry. etc., Id., 9 Eq. 266, *n.*; Heymann v. European etc. Ry., Id., 7 Eq. 154; Whitehouse's Case, Id., 3 Eq. 790; Mixer's Case, 4 De G. & J. 575, 586. When a person has thus been induced to purchase shares, he can not rescind his purchase and be struck off from the list of contributories, nor maintain an action against the company for that purpose, nor to recover back the amount paid, after the winding up of the company, nor even after the proceedings to wind up have been commenced, since after the establishment of these proceedings by an order of the court, the corporation is ended as a legal being; but this restriction does not seem to apply to suits brought to enforce a liability against the fraud-

§ 882. **III. Untruth of the Statement.**—The statement of fact must be untrue, or else there is no *misrepresentation*. The entire doctrine of the law and of equity concerning that species of fraud which consists in *suggestio falsi*, is based upon the assumption that the representation is in fact untrue, as this very name itself shows. This is the premise of fact which is assumed in every case which discusses the nature of fraud, and decides whether it does or does not exist in any particular instance. This requisite element needs, therefore, no examination and no citation of special authorities; it is not susceptible of any exception or limitation.

§ 883. **IV. The Intention, Knowledge, or Belief of the Party Making the Statement.**—This element, the mental state or condition of the party making the representation, is the most important and characteristic feature of fraud, both in equity and at law. It is, moreover, that constituent of fraud with respect to which there exists the principal difference or divergence between the theory which prevails in equity and that which forms a part of the law. It will aid us, therefore, in obtaining a more accurate notion of the equitable conception by comparison, to present a very brief summary of the doctrine on this subject which has been settled by courts of law.

§ 884. **The Knowledge and Fraudulent Intention Requisite at Law.**—The court of queen's bench at one time maintained, in a series of decisions, the following doctrines: Whenever one party to a transaction, A., made a representation of fact which was in reality untrue, and the other party, B., relied upon the statement, and was induced by it to do or to omit something, and thereby suffered some damage, such representation was fraudulent, and A. was liable for his actual fraud, even though he had made the statement without any knowledge of its untruth,—his liability was independent of his knowledge or ignorance of its actual falsity. This theory admitted the possibility of fraud at law where there was no moral delinquency; it denied that moral wrong was an *essential* element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American states.[1] These cases have, how-

ulent directors personally. Burgess's Case, L. R., 15 Ch. D. 507; Oakes v. Turquand, Id., 2 H. L. 325; Stone v. City & Co. B'k, Id., 3 C. P. Div. 282; Houldsworth v. City of Glasgow Bk., L. R., 5 App. Cas. 317, 323; Tennent v. City of Glasgow Bk , Id., 4 App. Cas. 615, 621; Kent v. Freehold etc. Co., Id., 3 Ch. 493; *In re* London etc. Bk., Id., 12 Eq. 331; *In re* Overend etc. Co., Id., 3 Eq. 576.

[1] Fuller v. Wilson, 3 Q. B. 58; 3 Q. B. 1009; Taylor v. Ashton, 11 M. & W. 401; Evans v. Collins, 5 Q. B. 804.

ever, been overruled, and the theory itself has been abandoned, in England, and even generally if not universally throughout the states of our own country. It is now a settled doctrine of the law, that there can be no fraud, misrepresentation, or concealment, without some *moral* delinquency; there is no actual *legal* fraud, which is not also a *moral* fraud.[1] This immoral element consists in the necessary guilty knowledge and consequent intent to deceive—sometimes designated by the technical term, the "*scienter*." The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time when he makes it. It is well settled that fraudulent misrepresentations may assume the three following forms or phases at law. (1) A party making an untrue statement has at the time an actual, positive knowledge of its falsity; he states what he absolutely knows to be untrue. This is the simplest, plainest, and most direct species of fraud. (2) A party making an untrue statement does not at the time have any belief that it is true. The making an untrue statement, of the truth of which the party of course has no knowledge, and which he does not even believe to be true, is tantamount to the making of a statement which the party knows to be untrue. (3) Finally, a party making an untrue statement, having at the time no knowledge whatever on the subject, *and no reasonable grounds to believe it to be true*, is guilty of fraud, and his claiming that he believed it to be true can not remove its fraudulent character. A definite statement of what the party does not know to be true, where he has no reasonable grounds for believing it to be true, will, if false, have the same legal effect as a statement of what the party positively knows to be untrue.[2] In each of these three phases

[1] Evans v. Collins, 5 Q. B. 820, reversing S. C., Id. 804; Barley v. Walford, 9 Id. 197; Moens v. Heyworth, 10 M. & W. 147; Ormrod v. Huth, 14 Id. 650. Untrue representations honestly made do not constitute fraud at law: Wakeman v. Dalley, 51 N. Y. 27; Marsh v. Falker, 40 Id. 562, 566.

[2] Evans v. Edmonds, 13 C. B. 777, 786, *per* Maule, J.; Smout v. Ilbery, 10 M. & W. 1, 10, *per* Alderson, B.; Taylor v. Ashton, 11 M. & W. 401; Young v. Covell, 8 Johns. 23; Benton v. Pratt, 2 Wend. 335; Tyson v. Passmore, 2 Barr. 122; Fisher v. Worrall, 5 W. & S. 478, 483; Joice v. Taylor, 6 Gill & J. 54. In Evans v. Edmonds, *supra*, Maule, J., said: "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts." In Young v. Covell, *supra*, the court said of an action for deceit, that "it can not be maintained without prov-

there is *moral* wrong, and a very slight, if any, difference in the degree of the culpability. In each there is actual knowledge of the untruth, or else the law conclusively imputes knowledge to the party, and treats him as though actually possessing it.

§ 885. **Knowledge or Intention Requisite in Equity.**—There are, undoubtedly, some authorities which, taken literally, would make *moral* wrong a necessary ingredient of fraud in equity as well as at law, since they require a guilty knowledge of the untruth as an essential element.[1] This view is, however, certainly incorrect. It is fully settled by the ablest courts, English and American, that there may be actual fraud—not merely constructive fraud—in equity without any feature or incident of *moral* culpability; that the actual fraud consisting of misrepresentation, is not necessarily immoral. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity.[2] Whatever would be fraudulent at law, will be so in equity; but the equitable doctrine goes far-

ing actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple fact of misrepresentation, unaccompanied by fraudulent design, is not sufficient." See, also, Stitt v. Little, 63 N. Y. 427; Eaton C. & B. Co. v. Avery, 83 N. Y. 31; Hubbell v. Meigs, 50 Id. 480; Hathorne v. Hodges, 28 Id. 486; Hathaway v. Johnson, 55 Id. 93; Indianapolis etc. R. R. v. Tyng, 63 Id. 653, 655; Butler v. Collins, 12 Cal. 457; McBean v. Fox, 1 Ill. App. 177; Collins v. Evans, 5 Q. B. 820; Ormrod v. Huth, 14 M. & W. 650; Pasley v. Freeman, 3 T. R. 51; National Exch. Co. v. Drew, 2 Macqueen, 103.

[1] Thus in Adams' treatise, 176 (m. p.), 364 (6th Am. ed.), the author, after stating that there are two classes of fraud, the first by means of willful misrepresentation, and the second by procuring acts to be done by persons under duress or incapacity, adds: "In order to constitute a fraud of the first class, there must be a representation express or implied, *false within the knowledge of the party making it*, reasonably relied upon by the other party," etc.

[2] In Traill v. Baring, 4 De G. J. & S. 318, 328, L. J. Turner said: "I desire, in the first place, to absolve the defendants from all imputation of any *intention* of actual fraud. But that by no means disposes of the case; for there are many states of circumstances in which there is technical fraud, in which transactions are fraudulent in the eyes of this court, or characterized by the designation of fraud, although there may be no moral fraud. The question really here is, whether this case does or does not fall within the range of those cases in which this court holds a transaction to be fraudulent, although it may not be morally so." In Ship v. Crosskill, L. R., 10 Eq. 73, 83, Lord Romilly said: "I fully adopt the distinction expressed by Lord Redesdale, between fraud properly so called, and which is called constructive fraud, where persons have really been guilty of no moral fraud, but by a species of construction of equity they are said to be guilty of a fraud." In using the word "constructive" here, the master of rolls plainly does not refer to that main division of fraud called "constructive" in contrast with the division called "actual." He is speaking of those instances belonging to the general division "actual," in which the fraud arises from the construction of equity, in contradistinction to the fraud at law, which must always be immoral. See, also, Hovenden v. Lord Annesley, 2 Sch. & Lef. 607, 617, *per* Lord Redesdale; Rawlins v. Wickham, 3 De G. & J. 304, 316.

ther, and includes instances of fraudulent misrepresentations which do not exist in the law. There are, however, well-established limits to this equitable conception, which should be carefully observed. Every wrongful act, even by persons in positions of trust and confidence, which gives occasion for a remedy, is not fraudulent. Breaches of their duty by persons in fiduciary relations, acts of agents in excess of their authority, and the like, are not as such instances of actual fraud, although they may sometimes fall within the division of "constructive fraud."[1] I shall, in further illustration of this subject, enumerate and describe the different phases and forms of fraudulent misrepresentations recognized by equity, some of them being identical with those found in the law.

§ 886. **Forms of Fraudulent Misrepresentations in Equity.**—(1) Where a party makes a statement which is untrue, and has at the time an actual, positive knowledge of its untruth, and the necessarily resulting intent to deceive—the *scienter* at law. This is the most direct and in some respects the highest form of fraud.[2] Wherever the facts of the statement are the acts of the very party making it, which are represented as having been done by him, if the statement is untrue, the knowledge of its untruth is necessarily and conclusively imputed to the party. In all cases involving such kind of misrepresentation, if knowledge of the untruth be a requisite element of the liability, such knowledge will be conclusively preserved.[3]

[1] Stewart v. Austin, L. R., 3 Eq. 299, 306, holding that an act in excess of authority by an agent, is not equitable fraud.

[2] In Patch v. Ward, L. R., 3 Ch. 203, 207, Lord Cairns well describes this form as follows: "Actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him." Hill v. Lane, L. R., 11 Eq. 215; Ship v. Crosskill, Id., 10 Eq. 73, 82, 83; Henderson v. Lacon, Id., 5 Eq. 249, 262; Rawlins v. Wickham, 3 De G. & J. 304, 312; Reynell v. Spryc, 1 De G. M. & G. 660, 691; West v. Jones, 1 Sim., N. S., 205, 208; Chesterfield v. Janssen, 2 Ves. Sen. 124, 155; Neville v. Wilkinson, 1 Bro. Ch. 543, 546; Attwood v. Small, 6 Cl. & Fin. 232; Evans v. Bicknell, 6 Ves. 173, 182; Bankhead v. Alloway, 6 Coldw. 56, 75; Wampler v. Wampler, 30 Gratt. 454; Laidlaw v. Organ, 2 Wheat. 178, 195; Smith v. Richards, 13 Pet. 26, 36; Frenzel v. Miller, 37 Ind. 1.

[3] This conclusion necessarily follows from the form of the representation and the nature of man's mind and memory. In Henderson v. Lacon, L. R., 5 Eq. 249, 262, the suit was brought to hold directors of a company personally liable for false representations contained in a prospectus which untruly stated that they had done certain acts. Page Wood, V. C.—Lord Hatherley—after holding that in such a suit it is necessary to fix upon the directors the *scienter* as in an action for deceit, that they must have guilty knowledge of the untruth of their statements, adds: "In this instance it appears to me that the *scienter* is clearly fixed upon the directors, from the moment you find a representation concerning *their own acts* which is incorrect, and which they must be taken to have known to be

In suits involving misrepresentations of this form, if the party charged with the fraud is examined as a witness in his own behalf, the better rule is that he can not be asked, as a part of his examination in chief, whether or not he believed his representation to be true.[1] (2) If a person makes an untrue statement, and has at the time no knowledge of its truth, and even has no *belief* in its truth, he is chargeable with fraud in equity as well as in law. Making a statement which the party does not believe to be true, is only slightly removed in culpability from the making a statement which the party knows to be false.[2]

§ 887. **The Same.**—(3) Where a person makes an untrue statement, and has at the time no knowledge of its truth, and there are no reasonable grounds for his believing it to be true, he is chargeable with fraud, although he had no absolute knowledge of its untruth, and may claim to have had a belief in its truth.[3] This is the mode in which the rule is ordinarily laid down by courts of law, and sometimes by courts of equity. The equity cases have, however, settled the rule in somewhat broader terms, omitting entirely the qualification "that there are no reasonable grounds for the person's believing his statement to be true." In other words, it is settled in equity by an overwhelming array of authority, that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement can not be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effects to the assertion of something which the party knows to be untrue.[4]

incorrect, and to have knowingly stated, and thereby to have misled the party complaining of the misrepresentation." See, also, Ship v. Crosskill, L. R., 10 Eq. 73, 83, 84; New Brunswick etc. Co. v. Muggeridge, 1 Dr. & Sm. 363.

[1] Hine v. Campion, L. R., 7 Ch. D. 344. To allow the party charged under such circumstances, to testify in his own behalf, that he had a belief, or that he had no wrongful intent, and the like, is a violation, as it seems to me, of the plainest and most fundamental principles of judicial evidence. If he asserts his belief or denies his intent, and reliance is placed in what he says, then his liability is destroyed and the controversy is ended.

[2] Jennings v. Broughton, 5 De G. M. & G. 126, 130; Haight v. Hayt, 19 N. Y. 464; White v. Merritt, 7 Id. 352; Doggett v. Emerson, 3 Story, 700; Hough v. Richardson, Id. 659; Daniel v. Mitchell, 1 Id. 172; Warner v. Daniels, 1 Wood. & M. 90; Hammatt v. Emerson, 27 Me. 308; Stone v. Denny, 4 Met. 151; Hazard v. Irwin, 18 Pick. 95; Twitchell v. Bridge, 42 Vt. 68; Cabot v. Christie, Id. 121; Fisher v. Mellen, 103 Mass. 503 (asserting as fact known to the party what was only opinion).

[3] Jennings v. Broughton, 5 De G. M. & G. 126, 130.

[4] It might, perhaps, be said that these two modes of stating the doctrine were virtually the same; because if the party had no knowledge at all concerning the matter, he certainly

§ 888. **The Same.**—(4) Where a person makes a statement of fact which is untrue, but at the time of making it he honestly believes it to be true, and this belief is based upon reasonable grounds which actually exist, the misrepresentation so made is not fraudulent either in equity or at law.[1] This general proposition is subject, however, to the two following important limitations. (5) Where such an untrue statement is made, in the honest belief of its truth, so that it is the result of an innocent error, and the truth is afterwards discovered by the person who has innocently made the incorrect representation, if he then suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes in equity a fraudulent representation, even though it

would have no reasonable grounds for believing his statement to be true. It is plain, however, that the equity courts intend their language to be broader than that of the law courts, and to include instances not falling within the legal formula. The qualification, "there are no reasonable grounds for believing his statement," seems to imply circumstances which operate *affirmatively*, to prevent the party from forming a belief. The language of the equity courts, in omitting this qualification, seems to be wholly negative, and to require only an absence of knowledge. Rawlins v. Wickham, 3 De G. & J. 304, 313, 316; Traill v. Baring, 4 De G. J. & S. 318, 326, 328, 329; West v. Jones, 1 Sim., N. S., 205, 208; Att'y-Gen. v. Ray, L. R., 9 Ch. 397, 405; Smith v. Reese R. M. Co., Id., 2 Eq. 264, 269; Pulsford v. Richards, 17 Beav. 87, 94; Hart v. Swaine, L. R., 7 Ch. Div. 42, 46. In this last case the court say: "The defendant took upon himself to assert that to be true which has turned out to be false, and he made this assertion for the purpose of benefiting himself. Though he may have done this believing it to be true, the result is that he is guilty of a fraud." In Rawlins v. Wickham, *supra*, Turner, L. J., said: "If upon a treaty for purchase one of the parties to the contract makes a representation materially affecting the subject-matter of the contract, he surely can not be heard to say that he knew nothing of the truth or falsehood of that which he represented, and still more surely he can not be allowed to retain any benefit which he has derived if the representation he has made turns out to be untrue. It would be most dangerous to allow any doubt to be cast upon this doctrine." Torrance v. Bolton, L. R., 8 Ch. 118; 14 Eq. 124; Aberaman Iron Works, Id., 4 Ch. 101; 5 Eq. 485; Peek v. Gurney, Id., 13 Id. 79, 113; Smith v. Richards, 13 Pet. 26; Hough v. Richardson, 3 Story, 659; Smith v. Babcock, 2 Wood. & M. 246; Mason v. Crosby, 1 Id. 342; Hammatt v. Emerson, 27 Me. 308, 326; Harding v. Randall, 15 Id. 332; Hazard v. Irwin, 18 Pick. 95; Stone v. Denny, 4 Met. 151; Marsh v. Falker, 40 N. Y. 562; Bennett v. Judson, 21 Id. 238; Craig v. Ward, 36 Barb. 377; Taymon v. Mitchell, 1 Md. Ch. 496; Smith v. Mitchell, 6 Ga. 458; Reese v. Wyman, 9 Id. 430, 439; Thompson v. Lee, 31 Ala. 292; Oswald v. McGehee, 28 Miss. 340; Mitchell v. Zimmerman, 4 Tex. 75; York v. Gregg, 9 Id. 85; Buford v. Caldwell, 3 Mo. 477; Glasscock v. Minor, 11 Id. 655; Converse v. Blumrich, 14 Mich. 109, 123; Allen v. Hart, 72 Ill. 104; Wilcox v. Iowa W. Univ., 32 Iowa, 367; Hammond v. Pennock, 61 N. Y. 145, 151, 152; Hawkins v. Palmer, 57 Id. 664; Sharp v. Mayor, 40 Barb. 256; Twitchell v. Bridge, 42 Vt. 68; Beebe v. Knapp, 28 Mich. 53; Stone v. Covell, 29 Id. 359; Frenzel v. Miller, 37 Ind. 1; Graves v. Lebanon B'k, 10 Bush, 23; Bankhead v. Alloway, 6 Coldw. 56; Thompson v. Lee, 31 Ala. 292; Elder v. Allison, 45 Ga. 13.

[1] Cabot v. Christie, 42 Vt. 121, 126; Fisher v. Mellen, 103 Mass. 503; Wakeman v. Dalley, 51 N. Y. 27; Marsh v. Falker, 40 Id. 562, 566; Weed v. Case, 55 Barb. 534; Hartford Ins. Co. v. Matthews, 102 Mass. 221; Wheeler v. Randall, 48 Ill. 182.

was not so originally.[1] (6) Finally, if a statement of fact actually untrue is made by a person who honestly believes it to be true, but under such circumstances that the *duty* of knowing the truth rests upon him, which, if fulfilled, would have prevented him from making the statement, such misrepresentation may be fraudulent in equity, and the person answerable as for fraud; forgetfulness, ignorance, mistake, can not avail to overcome the pre-existing *duty* of knowing and telling the truth.[2]

§ 889. **Requisites of a Misrepresentation as a Defense to the Specific Enforcement of Contracts in Equity.**—Having thus described the elements of a misrepresentation, with reference to the knowledge or belief of the person, in order that it may constitute fraud in the contemplation of equity, and having explained the various forms or phases which such a misrepresentation may assume, it will be proper to present in this connection, those special features and qualities of a misrepresentation which apply to the particular case of a defense to suits for the enforcement of contracts; the entire view of this subject will thus be completed. In setting up a material misrepresentation to defeat the specific performance of a contract, the element of a *scienter*, of knowledge, of belief with or without reasonable grounds, or of intent, is wholly unnecessary and immaterial. So far as this most essential element of a fraudulent misrepresentation is concerned, it is sufficient to defeat a specific performance that the statement is actually untrue so as to mislead the party to whom it is addressed; the party making it need not know of its falsity, nor have any intent to deceive; nor does his belief in its truth make any difference. With respect to its effect upon the specific performance of a contract, a party making a statement as true, however honestly, for the purpose of influencing the conduct of the other party, is bound to know that it *is* true, and must stand or fall by his representation.[3] The

[1] Reynell v. Sprye, 1 De G. M. & G. 660, 709, *per* Lord Cranworth; Traill v. Baring, 4 De G. J. & S. 318, 329, 330, *per* Turner, L. J.; Underhill v. Horwood, 10 Ves. 209, 225.

[2] Burrowes v. Lock, 10 Ves. 470, 475; Rawlins v. Wickham, 3 De G. & J. 304, 313, 316; Traill v. Baring, 4 De G. J. & S. 318, 329, 330; Pulsford v. Richards, 17 Beav. 87, 94; Smith v. Reese River M. Co., L. R., 2 Eq. 264, 269; Slim v. Croucher, 1 De G. F. & J. 518, 523, 524; 2 Giff. 37; Price v. Macaulay, 2 De G. M. & G. 339, 345; Hutton v. Rossiter, 7 Id. 9; Ayre's Case, 25 Beav. 513, 522; Ainslie v. Medlycott, 9 Ves. 12, 21; Henderson v. Lacon, L. R., 5 Eq. 249, 262; Swan v. North Br. etc. Co., 2 H. & C. 175, 183; Babcock v. Case, 61 Pa. St. (11 P. F. Sm.) 427, 430.

[3] *In re* Banister, L. R., 12 Ch. D. 131, 142; Ainslie v. Medlycott, 9 Ves. 13, 21; Dyer v. Hargrave, 10 Ves. 506; Wall v. Stubbs, 1 Madd. 80. The following are recent cases which furnish examples of misrepresentations which have been set up to defeat a specific performance. Powell v. Elliot, L. R., 10 Ch. 424; Harnett v. Baker, Id., 20 Eq. 50; Upperton v. Nickolson, 6 Ch. 436; 10 Eq. 228; Whittemore v.

point upon which the defense turns is the *fact* of the other party having been misled by a representation calculated to mislead him, and not the existence of a design to thus mislead. It follows as a plain consequence of this general doctrine, that if a party makes a misrepresentation, whereby another is induced to enter into an agreement, he can not escape from its effects by alleging his forgetfulness at the time of the actual facts.[1] Where the misrepresentation does not extend to the entire scope of the agreement, or even to any of its most important parts, but relates merely to some incidental, subordinate, or collateral feature of it, the court, instead of denying all relief to the plaintiff, may direct a specific performance with an abatement of the price, or other form of compensation to the defendant.[2] Of course, when the representation is so coupled with knowledge, or want of belief, or intent, as to constitute actual fraud in any of its phases, it will *a fortiori* defeat the remedy of specific performance.

§ 890. **V. Effect of the Representation on the Party to Whom it is Made; His Reliance upon it** —Another element of a fraudulent misrepresentation, without which there can be no remedy, legal or equitable, is, that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct which alters his legal relations. Unless an untrue statement is believed and acted upon, it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so thoroughly induced by it that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction.[3] It is not

Whittemore, Id., 8 Eq. 603; Denny v. Hancock, Id., 6 Ch. 1; Leyland v. Illingworth, 2 De G. F. & J. 248, 252, 254; Price v. Macaulay, 2 De G. M. & G. 339; Swimm v. Bush, 23 Mich. 99; Holmes's Appeal, 77 Pa. St. (27 P. F. Sm.) 50. In none of these cases, with one or two exceptions, was there the slightest suggestion of any intent to deceive on the part of the vendor; nor even an allegation that he knew of the wrong statement. The question of his knowledge, belief, or intent, was wholly immaterial, because the decision need not turn upon it. It is the fact of the other party's being misled, and not the design to mislead him, which constitutes the defense in this class of cases. It is apparent, therefore, that the language which judges have used concerning misrepresentations in such cases, should not be confounded with the terms which are employed in describing the elements of a misrepresentation in order that it may be fraudulent.

[1] Burrowes v. Lock, 10 Ves. 470, 476; Price v. Macaulay, 2 De G. M. & G. 339; Bacon v. Bronson, 7 Johns. Ch. 194. The same is true in suits for rescission and other relief based upon actual fraud.

[2] See several of the cases in the last note but one.

[3] It is certainly incorrect to lay down this rule, as it is often found both in judicial opinions and in textbooks, namely, "the inducement must be so strong that without it the party would not have entered into the

necessary that the false representation should be the sole inducement; others may concur with it in influencing the party. Where several representations have been made, and one of them is false, the court has no means of determining, as was well said by Lord Cranworth, that this very one did not turn the scale.[1] The misrepresentations must, however, be concerning something really material. Statements, although false, respecting matters utterly trifling, which can not affect the value or character of the subject-matter, so that if the truth had been known the party would not probably have altered his conduct, are not an occasion for the interposition of equity.[2]

§ 891. **The Party must be Justified in Relying on the Representation.**—The foregoing requisite that the representa-

contract." It is clearly impossible, from the nature of the case, to state such a future and contingent matter with absolute certainty; the mode in which the rule is formulated in the text is the only one consistent with the truth, and is all that the law really means or can demand. In the great case of Attwood v. Small, 6 Cl. & Fin. 232, 447, in which the whole doctrine of fraud was fully explained, Lord Brougham thus states this rule: "Now, my lords, what inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design can be connected with the particular transaction, and not only connected with the particular transaction, but *must be made to be the very ground upon which this transaction took place*, and must have given rise to this contract." The rule was also well expressed in Pulsford v. Richards, 17 Beav. 87, 96. "To use the expression of the Roman law, it must be a representation *dans locum contractui*, that is, a representation giving occasion to the contract; the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which *it is reasonable to infer* that he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether." Reynell v. Sprye, 1 De G. M. & G. 660, 691, 708, 709; Jennings v. Broughton, 5 Id. 126; Rawlins v. Wickham, 3 De G. & J. 304; Nelson v. Stocker, 4 Id. 458; Lord Brooke v. Rounthwaite, 5 Hare, 298, 306; Vigers v. Pike, 8 Cl. & Fin. 562, 650; Conybeare v. New Brunswick etc. Co., 1 De G. F. & J. 578; Smith v. Reese River M. Co., L. R., 2 Ch. 604, 613; 2 Eq. 264; Evans v. Bicknell, 6 Ves. 174, 182–192; Nicol's Case, 3 De G. & J. 387; Hough v. Richardson, 3 Story, 659; Daniel v. Mitchell, 1 Id. 172; Mason v. Crosby, 1 Wood. & M. 342; Tuthill v. Babcock, 2 Id. 298; Ferson v. Sanger, 1 Id. 138; Prescott v. Wright, 4 Gray, 461; Taylor v. Fleet, 1 Barb. 471, 475; Morris Canal Co. v. Emmett, 9 Paige, 168; Masterton v. Beers, 1 Sweeney, 406; 6 Robert. 368; Levick v. Brotherline, 74 Pa. St. (24 P. F. Sm.) 149, 157; Percival v. Harger, 40 Iowa, 286; Bryan v. Hitchcock, 43 Mo. 527; Klopenstein v. Mulcahy, 4 Nev. 296; Slaughter's Adm'r v. Gerson, 13 Wall. 379; Wampler v. Wampler, 30 Gratt. 454; McShane v. Hazlehurst, 50 Md. 107; McBean v. Fox, 1 Ill. App. 177; Roseman v. Canovan, 43 Cal. 110; Long v. Warren, 68 N. Y. 426; Chester v. Comstock, 40 Id. 575 n.; Taylor v. Guest, 58 Id. 262; Laidlaw v. Organ, 2 Wheat. 178, 195.

[1] Reynell v. Sprye, 1 De G. M. & G. 660, 708, 709: Addington v. Allen, 11 Wend. 374, an action for deceit, in which the court said: "Although other inducements besides the representations may have operated in the giving credit, it is enough if the vendor is *moved* by such representations, so that without them the goods would not have been parted with."

[2] Percival v. Harger, 40 Iowa, 286; Winston v. Gwathmey, 8 B. Mon. 19; Geddes v. Pennington, 5 Dow, 159.

tion must be relied upon, plainly includes the supposition that the party is justified, under all the circumstances, in thus relying upon it. This branch of the rule presents by far the greatest practical difficulties in the decision of cases, because, although the rule is well settled, and is most clearly just, its application must depend upon the facts of each particular case, and upon evidence which is often obscure and conflicting. In determining the effect of a reliance upon representations, it is most important to ascertain, in the first place, whether the statement was such that the party was justified in relying upon it, or was such, on the other hand, that he was *bound* to inquire and examine into its correctness himself. In respect to this alternative, there is a broad distinction between statements of fact which really form a part of, or are essentially connected with, the substance of the transaction, and representations which are mere expressions of opinion, hope, or expectation, or are mere general commendations. It may be laid down as a general proposition, that where the statements are of the first kind, and especially where they are concerning matters which, from their nature or situation, may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely on them; he is justified in relying on them, and in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself. It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word; if he claims that the other party was not misled, he is bound to show clearly that such party did know the real facts; the burden is on him of removing the presumption that such party relied and acted upon his statements.[1] The rule is equally well settled with respect to the

[1] Reynall v. Sprye, 1 De G. M. & G. 660, 691, 708; Rawlins v. Wickham, 3 De G. & J. 304; Conybeare v. New Brunswick etc. Co., 1 De G. F. & J. 578. In Leyland v. Illingworth, 2 Id. 248, 253, 254, in which it was held that the purchaser had a right to rely on a certain statement made by the vendor and was not bound to inquire for himself, L. J. Turner said: "If the question had been whether the supply of water was adequate or inadequate, the case would probably have fallen within the authorities referred to in opposition to the purchaser's claim. It would have been a question of opinion, not of fact, and the purchaser would have been put upon inquiry. But there is no such question in this case. The description is a representation of a fact," etc. See, also, Dyer v. Hargrave, 10 Ves. 505; Fenton v. Browne, 14 Id. 144; Wall v. Stubbs, 1 Madd. 80; Stewart v. Alliston, 1 Meriv. 26; Trower v. Newcome, 3 Id. 704; Lowndes v. Lane, 2 Cox, 363; Scott v. Hanson, 1 Sim. 13; Harris v.

second alternative. Where the representation *consists* of general commendations, or mere expressions of opinion, hope, expectation and the like; and where it relates to matters which, from their nature, situation, or time, can not be supposed to be within the knowledge or under the power of the party making the statement, the party to whom it is made is not justified in relying upon it and assuming it to be true; he is bound to make inquiry and examination for himself so as to ascertain the truth; and in the absence of evidence it will be presumed that he has done so, and acted upon the result of his own inquiry and examination.[1] Any representation, in order that one may

Kemble, Id. 111; 5 Bligh (N. S.) 730; Price v. Macaulay, 2 De G. M. & G. 339; Aberaman Ironworks, L. R., 4 Ch. 101; 5 Eq. 485; Martin v. Cotter, 3 Jo. & Lat. 496, 507; Brealey v. Collins, Younge, 317; Lord Brooke v. Rounthwaite, 5 Hare, 298; Cox v. Middleton, 2 Drew, 209; Farebrother v. Gibson, 1 De G. & J. 602; Cook v. Waugh, 2 Giff. 201; Johnson v. Smart, Id. 151; Boynton v. Hazelboom, 14 Allen, 107; Best v. Stow, 2 Sand. Ch. 298; Holmes's Appeal, 77 Pa. St. (27 P. F. Sm.) 50; Swimm v. Bush, 23 Mich. 99; Beardsley v. Duntley, 69 N. Y. 577; Wilkin v. Barnard, 61 Id. 628; McShane v. Hazlehurst, 50 Md. 107; Slaughter's Adm'r v. Gerson, 13 Wall. 379; Drake v. Latham, 50 Ill. 270; Fish v. Cleland, 33 Id. 238; Banta v. Palmer, 47 Id. 99; David v. Park, 103 Mass. 501; Bradbury v. Bardin, 35 Conn. 577; Batdorf v. Albert, 59 Pa. St. 59; Watts v. Cummins, Id. 84; Brandon v. Forest Co., Id. 187; Spalding v. Hedges, 2 Barr. 240; Morehead v. Eades, 3 Bush, 121 (a very instructive case).

[1] Dyer v. Hargrave, 10 Ves. 505; Fenton v. Browne, 14 Id. 144; Brealey v. Collins, Younge, 317; Lord Brooke v. Rounthwaite, 5 Hare, 298; Abbott v. Sworder, 4 De G. & Sm. 448; Colby v. Gadsden, 34 Beav. 416; Attwood v. Small, 6 Cl. & Fin. 232; Hough v. Richardson, 3 Story, 659; Pratt v. Philbrook, 33 Me. 17; Brown v. Leach, 107 Mass. 364; Veasey v. Doton, 3 Allen, 380; Clark v. Everhart, 63 Pa. St. (13 P. F. Sm.) 347; Winters's Appeal, 61 Id. (11 Id.) 307; Tindall v. Harkinson, 19 Ga. 448; Glasscock v. Minor, 11 Mo. 655; Wright v. Gully, 28 Ind. 475. As illustrations, in the often-quoted case of Jennings v. Broughton, 5 De G. M. & G. 126; 17 Beav. 234, it was held that in a contract for the sale of a mine, there was an essential difference between a representation of what was actually to be seen or had been seen at the works—the veins of ore, the amount of ore actually mined, and the like—and a general statement of the expectations, prospects, and capacities of the mine—the latter being in their very nature contingent and speculative, and respecting which the buyer was as able to judge as the seller. In Trower v. Newcome, 3 Meriv. 704, an advowson had been sold at auction, the written description stating that "a voidance of the preferment was likely soon to occur," but not speaking at all of the then present incumbent. At the sale, the auctioneer verbally announced that "the living would be void on the death of a person aged eighty-two." (This statement was, of course, made without authority, and so did not bind the vendor; for otherwise it seems to be a representation in the clearest possible manner of a most material fact.) In truth, the then incumbent was only thirty-two years old. Sir Wm. Grant held that the representation in the written description was so vague and general, and so entirely a matter of speculation or opinion, that the purchaser was only put on inquiry by it, and could not claim to have been misled. In Scott v. Hanson, 1 Sim. 13: 1 Russ. & My. 128, a statement that the land sold "was uncommonly rich water meadow," was only a general commendation. In Hume v. Pocock, L. R., 1 Ch. 379; 1 Eq. 423, it was held that the mere assertion by a vendor that he has a good title, on which the vendee relies without any investigation, is not necessarily such a misrepresentation as will defeat an enforcement of the

be justified in relying upon it, must be in some degree at least reasonable; at all events, it must not be so self-contradictory or absurd that no reasonable man could believe it. It must not, also, be so vague and general in its terms that it conveys no certain meaning.[1]

§ 892. **When He is or is not Justified in Relying.**—As a generalization from the authorities, the various conditions of fact and circumstance, with respect to the question how far a party is justisfied in relying upon the representation made to him, may be reduced to the four following cases, in the first three of which the party is not, while in the fourth he is justified in relying upon the statements which are offered as inducements for him to enter upon certain conduct:[2] 1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of mak-

contract. In Jefferys v. Fairs, L. R., 4 Ch. D. 448, a representation made without knowledge or any possible intent to mislead, was held no ground for interference, because it was of such a nature that the purchaser took his chance.

[1] Trover v. Newcome, 3 Meriv. 704, *per* Sir Wm. Grant; Irving v. Thomas, 18 Me. 418, 424, *per* Shipley, J.; Savage v. Jackson, 19 Ga. 305; Halls v. Thompson, 1 Sm. & Mar. 443.

[2] The doctrine is so admirably summed up by Lord Langdale, M. R., in Clapham v. Shillito, 7 Beav. 146, 149, 150, that I shall extract a passage from his opinion: "Cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party. Or, if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which upon due inquiry he ought to have obtained, and thus the notion of a reliance on the representations made to him may be excluded. Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed; but if the subject is in its nature uncertain, if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other." The third and fourth cases in the text above are discussed in the preceding paragraph (§ 891). The first and second are in reality only one; they involve the same principle, and the only difference between them is in the mode of proof—a fact being directly proved by direct evidence in the first, which is irresistibly inferred by a legal presumption in the second.

ing such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties. 4. But when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or the second case, then it will be presumed that he relied on the statement; he is justified in doing so.

§ 893. **Information or Means of Obtaining Information Possessed by the Party Receiving the Representation.**—I purpose to examine, under this head, the first two cases mentioned in the foregoing summary; they are the ones which present by far the greatest practical difficulties in the administration of justice. If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he can not claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports, or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He can not claim that he did not learn the truth and that he was misled.[1]

[1] One ground of this latter branch of the rule is the practical impossibility in any judicial proceeding of ascertaining exactly how much knowledge the party obtained by his inquiry; and the opportunity which a contrary rule would give to a party of repudiating an agreement or other transaction fairly entered into, with which he had become dissatisfied: Nelson v. Stocker, 4 De G. & J. 458; Conybeare v. New Brunswick etc. Co., 1 De G. F. & J. 578; Nicol's Case, 3 De G. & J. 387; Cargill v. Bower, L. R., 10 Ch. D. 502; Pratt v. Philbrook, 33 Me. 17; Brown v. Leach, 107 Mass. 364; Clark v. Everhart, 63 Pa. St. (13 P. F. Sm.) 347; Wright v. Gully, 28 Ind. 475; Glasscock v. Minor, 11 Mo. 655; Tindall v. Harkinson, 19 Ga. 448; Wilkin v. Barnard, 61 N. Y. 628; Morehead v. Eades, 3 Bush, 121 (a very instructive case, in which this aspect of the doctrine is discussed by Robertson, J.); David v. Park, 103 Mass. 501; Spalding v. Hedges, 2 Barr. 240; Batdorf v. Albert, 59 Pa. St. 59; Watts v. Cummins, 59 Id. 84; Brandon v. Forest Co., 59 Id. 187; Fish v. Cleland, 33 Ill. 238; Banta v. Palmer, 47 Id. 99; Brown v. Leach, 107 Mass. 364; Rockafellow v. Baker, 41 Pa. St. 319. In illustration of the first

§ 894. **Knowledge Possessed by the Same Party: Patent Defects.**—The same principle is applied under a somewhat different condition of circumstances. If the party receiving a misrepresentation is, at the time when it is made, either from knowledge acquired previously or obtained at that very moment, fully aware of the truth, acquainted with the facts as they really are, he can not claim to be misled, and can not defeat or disaffirm or rescind the transaction on the ground that it was entered into through false representations. The case of patent defects is merely an application of this equitable doctrine. If in a contract of sale or of leasing, representations are made by the vendor concerning some incidents, qualities, or attributes of the subject-matter which are open and visible, so that the

branch of the rule given in the text, Lord Holt said, in deciding an action at law for deceit (the principle being the same in law and in equity), as follows: Lysney v. Selby, 2 Ld. Raym. 1118, 1120: "If the vendor gives in his particular of the rents, and the vendee says he will trust him and inquire no further, but rely on his particular, then, if the particular be false, an action will lie; but if the vendee will go and inquire farther what the rents are, then it seems unreasonable he should have any action, though the particular be false, because he did not rely on the particular." The great case of Attwood v. Small, 6 Cl. & Fin. 232, is an admirable illustration of the second branch of the rule, and was finally decided in the house of lords by an application of its doctrine. Attwood had bargained to sell his works, and had made representations in regard to them, and these statements were claimed to be false. But during the negotiations the vendee had sent a committee to the works for the express purpose of examining into the truth of the statements. As a matter of fact they made a very superficial and incomplete examination, and did not discover all the truth; but they had the opportunity to make a thorough investigation; they were engaged in the same business, and were therefore experts; they were satisfied with what they saw, and reported favorably, and the contract was concluded. On a suit for rescission of the agreement, the H. of L. held that the vendees, by their own acts, had cut off any claim to being misled, and must be charged with the full knowledge which they might have obtained. If a party *chooses to judge for himself*, and then does not thoroughly use all the opportunities and sources of information offered or open to him, he can not be permitted to set up his own carelessness or imprudence, and claim to have been misled. Jennings v. Broughton, 5 De G. M. & G. 126; 17 Beav. 234, illustrates the same rule in a striking manner. Plaintiff had bought an interest in a mine, statements concerning it having been made by the vendors. The suit was brought to rescind the sale, on the ground that these statements were grossly fraudulent. The vendee had visited the mine before concluding the bargain to look for himself. The statements were concerning matters which he might have found out during his investigation, and it was held by the M. R. and by the court of appeal, that he must be taken to have ascertained the truth, and could not claim to have been misled by the misrepresentations. Lowndes v. Lane, 2 Cox, 363, is another illustrative case. A purchaser had bought property consisting partly of woods, on the representation that these woods had yielded, from timber cut and sold, £250 a year, on the average, for fifteen years. This statement was practically false, and was very misleading. But before concluding the contract a writing was delivered to him and kept in his possession, which, if examined by him, would have disclosed all the real facts and shown the untruth of the previous statements. He was held chargeable with the knowledge which he might and ought thus to have obtained.

falsity of the statement is patent to any ordinary observer, and it is made to appear that the purchaser, at or shortly before the concluding the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon such party; he is assumed to have made the agreement knowingly, and can not allege that he was misled by the false representations.[1] This special rule concerning patent defects, requires that the thing concerning which the statements are made should be seen or otherwise personally known by the purchaser, and that the defects should be plainly open and patent to any ordinary observer, and especially that no means should be used to conceal them, or to divert the buyer's attention from them, or in any way to prevent a fair inquiry.[2]

§ 895. **When the Knowledge or Information must be Proved, and not Presumed.**—The principle discussed in the two preceding paragraphs[3] is subject, however, to the following most important qualification, which is based upon the proposition heretofore stated, that whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The *mere existence of opportunities* for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact.[4] If one party—a vendor, for example—claims that the invalidating effects of his misrepresentations are obviated, and that the pur-

[1] Nelson v. Stocker, 4 De G. & J. 458; Dyer v. Hargrave, 10 Ves. 505; Bowles v. Round, 5 Ves. 508; Pope v. Garland, 4 Y. & C. Ex. 394; Shackleton v. Sutcliffe, 1 De G. & Sm. 609; Grant v. Munt, Cooper, 173; Hough v. Richardson, 3 Story, 659; Veasey v. Doton, 3 Allen, 380; Winters's Appeal, 61 Pa. St. (11 P. F. Sm.) 307; Slaughter's Adm'r v. Gerson, 13 Wall. 379.

[2] If the parties do not stand upon an equality, and one having better means of knowledge than the other uses any means to conceal the true facts or to divert inquiry from them, the transaction thus procured would be fraudulent. Mead v. Bunn, 32 N. Y. 275.

[3] That is, the principle underlying the first and second cases mentioned *ante* in § 892.

[4] Drysdale v. Mace, 2 Sm. & Gif. 225, 230.

chaser was not misled by them, either because they were concerning patent defects in the subject-matter, or because he was from the outset acquainted with the real facts, or because he had made inquiry and had thereby ascertained the truth, the foregoing qualification plainly applies; it is plainly incumbent on the vendor to prove the alleged knowledge of the purchaser by clear and positive evidence, and not to leave it a matter of mere inference or implication; *an opportunity or means of obtaining the knowledge* is not enough.[1] The qualification applies no less plainly to the case where the party receiving a representation has given to him an opportunity of examining into the real facts, or where his attention is directed to the sources of information. The mere opportunity or the means of investigation are not sufficient. Undoubtedly, if there had been no representation, they might or would have put the party upon an inquiry, and would, therefore, amount in law to a constructive notice of the facts which might have been learned by such inquiry; but the positive representation of a fact can not be counteracted by such implication. It must be shown that the party proceeded, in some measure, to avail himself of the opportunity; that he took some steps in making an independent investigation, so that, although his examination might not have been complete and successful, yet he must be charged with the knowledge he would have acquired by means of a thorough investigation. In other words, it must appear that through the opportunity and means of inquiry he received *some* information concerning the actual facts, so that, from considerations of expediency, he should not be allowed to allege his failure to obtain *all* the knowledge which he might have acquired.[2]

[1] Price v. Macaulay, 2 De G. M. & G. 339, 346, *per* Knight Bruce, L. J.: "Supposing, however, that the defendant [a purchaser] had actually known, at the time of the purchase, what were the real state and condition of the subject-matter of the contract, it may be that he would not be entitled to complain. But in order to enable a vendor to avail himself of that defense in such a case, he *must show very clearly* that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say, that he is to be assumed not to have spoken the truth. * * * It is said that subsequently he had such *notice as might have led him* to ascertain how the facts stood. That, however, is not sufficient in a case of misrepresentation; *he must be shown clearly to have had information* of the real state of the facts communicated to his mind." See, also, Wilson v. Short, 6 Hare, 366, 378; Dyer v. Hargrave, 10 Ves. 505; Higgins v. Samels, 2 J. & H. 460; Harnett v. Baker, L. R., 20 Eq. 50; Rawlins v. Wickham, 3 De G. & J. 304, 314, 318–320; Attwood v. Small, 6 Cl. &Fin. 232; Smith v. Reese River Co., L. R., 2 Eq. 264; Conybeare v. New Brunswick etc. Co., 1 De G. F. & J. 578; 9 H. L. Cas. 711; Kisch v. Cent. Ry. of Venezuela, 3 De G. J. & S. 122; L. R., 2 H. L. 99, 125.

[2] Price v. Macaulay, 2 De G. M. & G. 339, 346; Gibson v. D'Este, 2 Y. & C. Ch. 542, 572; the great case of

§ 896. **Words of General Caution.**—The rule that some independent *knowledge* of the true facts must be brought home to the party receiving such a representation, in order to counteract its effects in misleading him, and to prevent his reliance

Attwood v. Small, 6 Cl. & Fin. 232, well illustrates this position. The vendors of the works made certain positive representations concerning the property. The mere fact that the vendees could have visited the works, and by a personal examination have ascertained all the facts for themselves, would not lessen the effect of this representation. Even had the vendors invited the purchasers to come, given them an express opportunity to investigate, directed their attention to this means of verification, etc., this would not have altered the result. The vendees would have had a right to say, "No, you have made a statement concerning an existing condition of fact which is all within your own knowledge; true, we can come and verify this statement for ourselves, but we are willing to rely on your representation and complete the purchase." Had they done so, they would have been justified in doing it, and could have rescinded the contract. But they did not do so. They acted on the opportunity; they availed themselves of the means; they took some steps in making an investigation; and thus some information as to the true condition of affairs was communicated to their minds. That the investigation was not thorough, and the knowledge obtained perfect, was their own fault; whatever it was, they relied on *it*, and not on the representation of the vendors. Cox v. Middleton, 2 Drew. 209, is also illustrative. A vendor, in negotiating the sale of a house, stated that it was "substantially and well built," which was false. Although the vendee could very easily have inspected the house, and examined for himself how it was built, he was not obliged to do so, and did not, and it was held that this opportunity which he had did not impair the effect of the misrepresentation.

It is also decided in several cases, that where a vendor makes untrue statements respecting a lease—respecting its covenants and provisions—although the law would charge the vendee with constructive notice of what these covenants, etc., are, yet such notice does not obviate the effects of the false statements; the representation overrides what would otherwise be taken at law as a knowledge on the part of the purchaser, and he can take advantage of it as against the vendor. Van v. Corpe, 3 My. & K. 269; Flight v. Barton, Id. 282; Pope v. Garland, 4 Y. & C. Ex. 394, 401.

There is no contradiction between these conclusions and the rules stated in the two preceding paragraphs (§§ 893, 894). The question is, did the party rely on the representation, or on his own knowledge. To obviate the effect of the representation, it must be clearly and conclusively shown that he relied *on his own knowledge*. This the general doctrine and the qualification both demand. But neither of them requires that this knowledge be perfect, complete, accurate. Where there is an opportunity or means of examination, the party may decline to use it, for he has a right to rely on the representation of fact, and to remain personally in ignorance. If, however, he takes steps in an investigation and thus obtains some independent knowledge, and afterwards concludes the agreement, he must be assumed to have concluded it upon the strength of that acquired knowledge, however partial and deceptive, and not upon the representation. Where, however, there is no investigation made after the representation, in order to test it, but the vendor claims that his statements have not misled, because the defects were patent, or because the buyer was, from the outset, acquainted with all the facts—there it is the completeness and accuracy of the purchaser's knowledge alone which counteracts the effect of the representation and shows that it was not relied upon and did not mislead; in such case, therefore, it must be shown that the purchaser's knowledge of all the material facts covered by the misrepresentation, was full, accurate, and perfect. The vital question in each case, however, is, did the party receiving the representation rely upon it, in concluding the agreement or other transaction, or did he rely upon his own knowledge?

upon it, is of wide application. Nothing done by the party making the statement, and no extrinsic circumstances, will avail, unless they clearly lead to the conclusion that the transaction was concluded upon the strength of information, or substantial grounds for forming a judgment, other than the representation itself. A positive representation of fact can not be obviated by any general statement of the party making it or by any extrinsic circumstances which merely admit of or warrant an inference contrary to the representation, even though of themselves such statements or such circumstances might be sufficient to put the other party upon the inquiry. This is simply another application of the principle that the right of a party receiving a representation to rely upon it, can not be taken away or interfered with by inference or implication.[1] If, therefore, the party accompanies or follows his misrepresentation by words of general caution, or by advice to the other that he consult his friends or professional advisers before concluding the agreement, he does not thereby counteract any effect upon the transaction which his untrue statement would otherwise produce.[2] Nor does even the sale of a thing "with all its faults," render a contract valid which might otherwise be impeached or defeated by means of the vendor's representations.[3]

[1] Wilson v. Short, 6 Hare, 366, 377.

[2] Reynell v. Sprye, 1 De G. M. & G. 660, 709, 710, *per* Lord Cranworth; Dobell v. Stevens, 3 B. & C. 623, 625; Prescott v. Wright, 4 Gray, 461; Russell v. Branham, 8 Blackf. 277. In the often quoted case of Reynell v. Sprye, *supra*, Lord Cranworth, in answer to the objection that Reynell was cautioned by Sprye, and was negligent in act consulting his advisers, said: "No such question can arise in a case like the present, where one contracting party has intentionally misled the other, by describing his rights as being different from what he knew them really to be. In such a case it is no answer to the charge of imputed fraud to say, that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated."

[3] Where this condition is a part of the agreement, the purchaser must take the subject-matter with all its defects, patent or latent; but the vendor is not protected against his false representations. Schneider v. Heath, 3 Camp. 506; Early v. Garrett, 9 B. & C. 928; Springwell v. Allen, 2 East, 446, n. The case of Harris v. Kemble, 1 Sim. 111, 120; 5 Bligh (N. S.), 730, which came before Sir John Leach, M. R., Lord Chancellor Lyndhurst, and the house of lords, is a very instructive discussion of the doctrine concerning misrepresentations in most of its phases. A contract relating to a theater was made between the joint owners of it, for a sale of the share of one to the other. It was claimed that misrepresentations had been made as to the profits. These representations were based upon the books of accounts, which were open to both parties, and were justified by the accounts as they appeared on the books. Sir John Leach, for these reasons, held against the claim, and decided that the representations did not avoid the contract. This decision was beyond all doubt right, if the premises

§ 897. **Prompt Disaffirmance Necessary.**—All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations.[1]

§ 898. **VI. Materiality of the Misrepresentation.**—The last element of a misrepresentation, in order that it may be the ground for any relief, affirmative or defensive, in equity or at law, is its materiality. The statement of facts of which it consists must not only be relied upon as an inducement to some action, but it must also be so material to the interests of the party thus relying and acting upon it, that he is pecuniarily prejudiced by its falsity, is placed in a worse position than he otherwise would have been. The party must suffer some pecuniary loss or injury as the natural consequence of the conduct induced by the misrepresentation. In short, the representation must be so material that its falsity renders it un-

of fact were correct. Lord Lyndhurst and the house of lords, considering that the agreement was unquestionably procured by the representations, and that they were made for the purpose of obtaining it, found as a fact that the accounts were not equally plain to both parties; on the contrary, they were purposely kept in such a manner, that the party not familiar with them could not get at their real condition and ascertain the true state of the business, without the aid of an expert accountant. They, therefore, held that the party had been misled, and the contract was rescinded.

[1] See cases *ante* under §§ 817–820, as to effects of acquiescence and delay. Vigers v. Pike, 8 Cl. & Fin. 562, 630, *per* Lord Cottenham; Whitney v. Allaire, 4 Denio, 554 (when a party, after the making a contract, but before its performance, discovers the fraud of the other, and still goes on and performs his part, he is thereby precluded from the equitable remedy of cancellation, and also from the remedy of recovering back the consideration, but not from the legal remedy of damages for deceit); Woodcock v. Bennet, 1 Cow. 711; Voorhees v. De Meyer, 2 Barb. 37; Masson's Appeal, 70 Pa. St. (20 P. F. Sm.) 26, 29; Anthony v. Leftwich, 3 Rand. 258; McCorkle v. Brown, 9 Sm. & Mar. 167; Gibbs v. Champion, 3 Ohio, 335; Pratt v. Carroll, 8 Cranch, 471; McMichael v. Kilner, 76 N. Y. 36, 46; Schiffer v. Dietz, 83 Id. 300; Vernol v. Vernol, 63 Id. 45; Van Liew v. Johnson, 4 Hun, 415; Parsons v. Hughes, 9 Paige, 591; Bassett v. Brown, 105 Mass. 551; Northrop v. Bushnell, 38 Conn. 498; Bobb v. Woodward, 50 Mo. 95.

conscientious in the person making it to enforce the agreement or other transaction which it has caused. Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal; courts of justice do not act as *mere* tribunals of conscience to enforce duties which are *purely* moral.[1] If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable.[2]

§ 899. **Effects of a Misrepresentation.**—Having thus described the elements of a fraudulent misrepresentation in equity, I will add, in order to complete the account, a brief statement of its effects upon the rights of the defrauded, and the duties of the defrauding party. Wherever an agreement or other like transaction has been procured by means of a material fraudulent misrepresentation by one of the parties, the other has an election

[1] Fellowes v. Lord Gwydyr, 1 Sim. 63; 1 Russ & My. 83; Slim v. Croucher, 1 De G. F. & J. 518; Flint v. Woodin, 9 Hare, 618; Polhill v. Walter, 3 B. & Ad. 114; Clarke v. White, 12 Pet. 178; Wells v. Waterhouse, 22 Me. 131; Taylor v. Guest, 58 N. Y. 262; Wuesthoff v. Seymour, 22 N. J. Eq. (7 C. E. Green), 66; Marr's Appeal, 78 Pa. St. (28 P. F. Sm.) 66; Abbey v. Dewey, 1 Casey, 413; Lindsey v. Lindsey, 34 Miss. 432; Branham v. Record, 42 Ind. 181; Rogers v. Higgins, 57 Ill. 244; Wells v. Millet, 23 Wisc. 64; Morrison v. Lods, 39 Cal. 381; Bartlett v. Blaine, 83 Ill. 25; McShane v. Hazlehurst, 50 Md. 107; Bennett v. Judson, 21 N. Y. 238. Fellowes v. Lord Gwydyr, *supra*, is a very instructive case. The defendant, as vendee, entered into a contract of purchase, as he supposed, with one B., through the active instrumentality of A., who falsely represented himself as an agent for B. It turned out that A. was the real party in interest, and he sought to enforce the contract. The misrepresentation was set up as a defense. There was nothing proved from which it could be inferred that the defendant would not have made the same contract, on the same terms, with A. himself; nor was it shown that he had sustained any loss, damage, or inconvenience from the false statements. The court therefore held the misrepresentations to be immaterial and to be no defense. In Wuesthoff v. Seymour, *supra*, the vendor, in the negotiation which led to a contract for the sale of land, falsely represented to the vendee that a certain alley on the premises was only a private right of way belonging to a few persons only; in fact, it was a public alley, a public highway. This false representation being set up as a defense in a suit for a specific performance, the court held that it was immaterial; that it worked no material injury to the defendant since his rights of property were substantially the same in either case. With great deference to the judgment of so able a court, this decision can not, in my opinion, be supported on principle. The public easement was certainly a far greater incumbrance, and more detrimental to the pecuniary value of the premises, than a private easement in favor of a few specified persons would have been. One fact is a test of the difference. The purchaser might be able, by negotiation with the few persons entitled, to extinguish their easement; but he could not, by any private proceeding or negotiation, extinguish the public easement of the highway. Again, the private easement would be lost by non-user for a specified period; if the public easement could be destroyed at all in this manner, it would require a much longer time. It should be remembered that if *any* pecuniary loss results from the misrepresentation, the *quantum* of it is immaterial.

[2] Cadman v. Horner, 18 Ves. 10; Smith v. Kay, 7 H. L. Cas. 750, 775.

of equitable remedies. The injured party may at his option compel the fraudulent party to make good his representation—that is, to carry it into operation in the nature of a specific performance—when it is of such a nature that it can be thus performed; or he may rescind the agreement, and procure the transaction to be completely canceled and set aside.[1] Such a fraudulent misrepresentation, even though it relates only to a portion of a contract, furnishes a complete defense to an enforcement of the whole agreement. The fraudulent party will not be permitted, against the objection of the other, to waive that particular portion with which the false statement is concerned, and to obtain a specific performance of the remainder.[2] A material misstatement of fact, made innocently and therefore not fraudulent, if it relates to the substantial terms of the agreement, to its very essence, will also constitute a complete defense to the specific execution of the contract, although it may not be a sufficient ground for any affirmative relief.[3] On the other hand, where the misrepresentation, though material and untrue, is innocent, made in a *bona fide* belief of its truth, and therefore not fraudulent, and it relates to or concerns some portion only of the contract, it is not necessarily nor generally a complete defense to the enforcement of the contract. Under such circum-

[1] Rawlins v. Wickham, 3 De G. & J. 304, 321, 322; Clermont v. Tasburgh, 1 J. & W. 112; Edwards v. McLeay, 2 Sw. 287; G. Coop. 308; Pulsford v. Richards, 17 Beav. 87, 95; Att'y-Gen. v. Ray, L. R., 9 Ch. 397; Pearson v. Morgan, 2 Bro. Ch. 388; Evans v. Bicknell, 6 Ves. 174; Savery v. King, 5 H. L. Cas. 627; Western B'k v. Addie, L. R., 1 Sc. App. 145, 162; McFerran v. Taylor, 3 Cranch, 269; Neblett v. Macfarland, 2 Otto, 101; Grymes v. Sanders, 3 Id. 55, 62; Bacon v. Bronson, 7 Johns. Ch. 194; Neilson v. McDonald, 6 Id. 201; McCall v. Davis, 56 Pa. St. 431; Gatling v. Newell, 9 Ind. 572; Johnson v. Jones, 13 Sm. & Mar. 580. Courts of equity in administering these two principal remedies, viz., either cancellation or compelling a party to make good his representation by a specific performance, will also grant whatever additional and auxiliary relief may be necessary to render these remedies completely effective. Thus, when a person has through fraud obtained the legal title to land or other property, equity constantly treats him as a trustee for the one equitably entitled, and hence has sprung the doctrine of constructive trusts. The court will also grant an injunction to restrain the fraudulent party from disposing of the property, or from enforcing an executory contract or even a judgment obtained by fraud, and the like.

[2] Viscount Clermont v. Tasburgh, 1 J. & W. 112, 119, *per* Sir Thos. Plumer. The language of the judge in this case plainly describes a fraudulent misrepresentation; all his expressions are utterly inconsistent with an innocent though untrue misdescription or other misstatement. See, also, Cadman v. Horner, 18 Ves. 10; Boynton v. Hazelboom, 14 Allen, 107; Thompson v. Tod, 1 Peter's C. C. 380.

[3] See *ante*, § 889, and cases cited. For examples, where the vendor's untrue statement was as to his title to the whole property contracted to be sold; or where it concerned the nature of the entire estate, as representing it to be in fee when it was leasehold or for life; or where it related to some minor feature, but that feature affected the whole subject-matter alike. In such cases a partial enforcement with compensation would plainly be impossible.

stances, there is no rule of equity which prevents a partial enforcement of a contract which is divisible, or the specific execution of it with compensation in respect of its portions, incidents, or features which does not correspond with the description.[1] The destructive effect of fraud upon any contract, conveyance, or other transaction, is so essential and far-reaching, that no person, however free from any participation in the fraud, can avail himself of what has been obtained by the fraud of another, unless he is not only innocent, but has given some valuable consideration.[2] Although the burden of the fraud thus passes by transfer even to an innocent person, the right to relief, it seems, does not necessarily pass in the same manner. The general rule that a misrepresentation must be relied upon by the party receiving it, in order that it may be a sufficient ground for impeaching or defeating a contract, extends to the assignment of an agreement which, as between the original parties, is affected by a misrepresentation. If a contract between A. and B., voidable at the instance of B. on account of A.'s misrepresentation made to him in procuring it, is assigned by B. to a third person C., who is in no such relations with the original parties that he is affected by the fraud, and to whom no false statements are made in obtaining the transfer, the agreement thus assigned, if other-

[1] All of the numerous instances of a specific performance with compensation or abatement from the price on account of some partial failure of the subject-matter to agree with the description, are illustrations and proofs of the statement in the text. In Powell v. Elliott, L. R., 10 Ch. 424, the vendors of a large coal mine made misrepresentations as to the net income, and a specific execution with a deduction from the agreed price was decreed. In Whittemore v. Whittemore, L. R., 8 Eq. 603, there was a serious but not intentional misrepresentation as to the amount of land, and the agreement was enforced against the vendee with a corresponding abatement. In Leyland v. Illingworth, 2 De G. F. & J. 248, there was a misrepresentation by the vendors as to a water supply, and the vendee was given the option of either being discharged entirely from the contract or of completing it with compensation. Even where the misrepresentation is intentional, and the remedy of rescission would be granted, still the contract is voidable and not void, and, in accordance with the rule stated in the former part of the above paragraph, the injured party may waive his right to a complete defeat, and may insist on a partial specific performance with compensation for the defect, unless the case is such as furnishes no foundation for estimating the amount of the compensation. See, also, Pratt v. Carroll, 8 Cranch, 471; Voorhees v. De Meyer, 2 Barb. 37; Woodcock v. Bennet, 1 Cow. 711; Masson's Appeal, 70 Pa. St. 26, 29; Anthony v. Leftwich, 3 Rand. 238, 258; McCorkle v. Brown, 9 Sm. &. Mar. 167; Gibbs v. Champion, 3 Ohio, 335.

[2] Scholefield v. Templer, 4 De G. & J. 429, 433, *per* Lord Chan. Campbell; Topham v. Duke of Portland, 1 De G. J. & S. 517, 569, *per* Turner L. J.: "I take it to be clear, that no person, however innocent he may himself be, can, where there is no valuable consideration, derive a title under the fraud of another." Huguenin v. Baseley, 14 Ves. 273; Russell v. Jackson, 10 Hare, 204, 212; Bowen v. Evans, 2 H. L. Cas. 259; Goddard v. Carlisle, 9 Price, 169; Vane v. Vane, L. R., 8 Ch. 383. This is the converse of the rule that a *bona fide* purchaser for a valuable consideration may acquire a title free from an equity arising out of a prior fraud.

wise binding upon him, would be valid against C.; at least its enforcement against him would not be hindered by A.'s original misrepresentations, since he had not acted upon their faith and credit.[1]

§ 900. **Second. Fraudulent Concealments.**—A failure to disclose some material fact affecting the subject-matter, however unintentional and blameless, *may* be, and often is, a sufficient ground to defeat the specific performance of a contract, since that particular relief is only granted when it is just and equitable to both parties. Such a failure to disclose would not be fraudulent; the term concealment does not strictly apply to it; and it is only of fraudulent concealments we are now to speak, as one of the two main divisions of actual fraud. Fraudulent concealment implies knowledge and intention. Although there are some species of fraudulent misrepresentations, as has been shown, without these qualities, it is hardly possible to conceive of a fraudulent concealment without a knowledge of the fact suppressed possessed by the party, and an intention not to disclose such fact.

§ 901. **General Doctrine: Duty to Disclose.**—The general doctrine with respect to concealment as a form of actual fraud, and as distinguished from those analogous violations of fiduciary duty which do not constitute actual fraud, but may be included within the term constructive fraud, may be stated as follows: If either party to a transaction conceals some fact which is material, which is within his own knowledge, *and which it is his duty to disclose*, he is guilty of actual fraud.[2] It

[1] Smith v. Clarke, 12 Ves. 477, 484. Fraud only renders contracts voidable, and can be taken advantage of only by the person defrauded, his representatives and privies; the right to a remedy is personal. Harris v. Kemble, 5 Bligh (N. S.), 730, 751. The proposition of the text assumes that the contract alone is assigned. If a cause of action on account of the fraud has accrued in B.'s favor, and that is expressly assigned to C. with the contract—which is permissible under modern legislation in many of the states—the result would be different.

[2] Gibson v. D'Este, 2 Y. & C. Ch. 542; Wilde v. Gibson, 1 H. L. Cas. 605; Edwards v. McLeay, 2 Sw. 287; Coop. 308; Fox v. Mackreth, 2 Bro. Ch. 400, 420; Phillips v. Homfray, L. R., 6 Ch. 770; Baskcomb v. Beckwith, Id., 8 Eq. 100; Denny v. Hancock, Id. 6 Ch. 1; Haywood v. Cope, 25 Beav. 140; Lucas v. James, 7 Hare, 410; Drysdale v. Mace, 5 De G. M. &. G. 103; 2 Sm. & Gif. 225; Dolman v. Nokes, 22 Beav. 402; Bowles v. Stewart, 1 Sch. & Lef. 209, 224; Roddy v. Williams, 3 Jo. & Lat. 1; Gordon v. Gordon, 3 Sw. 400; Leonard v. Leonard, 2 Ball. & B. 171; Broderick v. Broderick, 1 P. Wms. 240; Rolt v. White, 3 De G. J. & S. 360; Mackay v. Douglas, L. R., 14 Eq. 106; Dicconson v. Talbot, Id., 6 Ch. 32; Vane v. Vane, Id., 8 Ch. 383; Stanley v. Stanley, Id., 7 Ch. D. 589; Peoples' B'k v. Bogart, 81 N. Y. 101; Brown v. Montgomery, 20 Id. 287; Livingston v. Peru Iron Co., 2 Paige, 390; Bench v. Sheldon, 14 Barb. 66; Nichols v. Pinner, 18 N. Y. 295; 23 Id. 264; Hennequin v. Naylor, 24 Id. 139; Hall v. Naylor, 18 Id. 588; Allen v. Addington, 7 Wend. 9, 20; B'k of Republic v. Baxter, 31 Vt.

is very difficult to lay down any general formula which shall be more definite than this, and at the same time accurate. The difficulty consists in stating a general rule, in harmony with decisions of authority, as to the duty of either party to disclose facts which are within his knowledge. It is certain that every concealment or failure to disclose material facts known to one party, is not fraud in equity or at law, whatever quality it may have before the tribunal of the individual conscience. It has never been contended, in our system of jurisprudence, that a vendor in a contract of sale is bound to disclose all facts which, if known by the buyer, would prevent or tend to prevent him from making the purchase. Much less has it ever been maintained that the buyer is bound to discover all facts known to himself which would enhance the value of the article sold or affect the conduct of the vendor. Even where the buyer purchases on credit, his *mere* failure to disclose his indebtedness, or his embarrassed financial condition, is not necessarily a fraudulent concealment. The same is generally true of all other species of contracts, and transactions, except of those species of agreements or engagements which are in their very essential nature intrinsically fiduciary, involving a condition of absolute

101; Paddock v. Strobridge, 29 Id. 470; Roseman v. Canovan, 43 Cal. 110, 117; Drake v. Collins, 5 How. (Miss.) 253; Bowman v. Bates, 2 Bibb, 47; Rawdon v. Blatchford, 1 Sandf. 344; Holmes's Appeal, 77 Pa. St. (27 P. F. Sm.) 50; Swimm v. Bush, 23 Mich. 99; Snelson v. Franklin, 6 Munf. 210; McNiel v. Baird, 6 Munf. 316; Emmons v. Moore, 85 Ill. 304; Dameron v. Jamison, 4 Mo. App. 299; Connelly v. Fisher, 3 Tenn. Ch. 382; Young v. Hughes, 32 N. J. Eq. 372; Howard v. Gould, 28 Vt. 523; Fitzsimmons v. Joslin, 21 Id. 129; Hanson v. Edgerly, 29 N. H. 343; Schiffer v. Dietz, 83 N. Y. 300; McMichael v. Kilmer, 76 Id. 36, 44; Dambmann v. Schulting, 75 Id. 55, 61; Hadley v. Clinton etc. Co., 13 Ohio St. 502; Gouinan v. Stephenson, 21 Wisc. 75; Hastings v. O'Donnell, 40 Cal. 148. The general doctrine was very clearly stated by Earl, J., in Dambmann v. Schulting, 75 N. Y. 55, 61: "The general rule is, that a party engaged in a business transaction with another can commit a legal fraud only by fraudulent misrepresentations of facts, or by such conduct or such artifice for a fraudulent purpose as will mislead the other party or throw him off from his guard, and thus cause him to omit inquiry or examination which he would otherwise make. A party buying or selling property, or executing instruments, must by inquiry or examination gain all the knowledge he desires. He can not proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had. Such is the general rule. But there are exceptions to this rule. Where there is such a relation of trust and confidence between the parties that the one is under some legal or equitable obligation to give full information to the other party—information which the other party has a right, not merely *in foro conscientiæ*, but *juris et de jure*, to have, then the withholding such information purposely may be a fraud." All of the foregoing cases show implicitly, and many of them hold expressly, the converse of the rule given in the text, namely, that in all transactions where there is no legal or equitable duty to make a disclosure, the failure to disclose material facts known to one party alone is not a fraudulent concealment by him.

good faith. While the decisions admit these propositions, they are agreed, on the other hand, that it is only *silence* which is permitted. If in addition to the party's silence, there is any statement, even any word or act on his own part, which tends affirmatively to a suppression of the truth, to a covering up or disguising the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent. The maxim is, "*aliud est celare, aliud tacere.*"[1]

§ 902. **When Duty to Disclose Exists.**—Concealment becomes fraudulent only when it is the duty of the party having knowledge of the facts to discover them to the other; and this brings back the question, when does such duty rest upon either party to any transaction? All the instances in which the duty exists, and in which a concealment is therefore fraudulent, may be reduced to three distinct classes. These three classes are in general clearly distinct and separate, although their boundaries may sometimes overlap, or a case may fall within two of them: (1) The first class includes all those instances in which, wholly independent of the form, nature, or object of the contract or other transaction, there is a previous, existing, definite fiduciary relation between the parties; so that the obliga-

[1] In Turner v. Harvey, Jacob, 169, 178, Lord Eldon, after stating the purchaser's right in general to keep silence, added: "A very little is sufficient to affect the application of that principle. If a word—a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." See, also, Davies v. Cooper, 5 My. & Cr. 270; Nickley v. Thomas, 22 Barb. 652; Bench v. Sheldon, 14 Barb. 66; Roseman v. Canovan, 43 Cal. 110; Dambmann v. Schulting, 75 N. Y. 55, 61.

Although a party may keep absolute silence and violate no rule of law or equity, yet if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover the whole truth. A partial statement then becomes a fraudulent concealment, and even amounts to a false and fraudulent misrepresentation. As illustrations: In Nickley v. Thomas, 22 Barb. 652, defendant sold a horse to the plaintiff, knowing that it was balky by habit and had repeatedly balked. He told the plaintiff that the horse "*balked once, and was whipped up and went.*" This was held to be a fraudulent concealment. In Bench v. Sheldon, 14 Barb. 66, plaintiff had lost a flock of sheep and had searched for them several days without success. Defendant discovered where the sheep were; went to the plaintiff, and, without disclosing the fact of his discovery or intimating it in any way, asked the plaintiff if he had found the flock; plaintiff answered that he had not; defendant then remarked that he "supposed plaintiff never would find them," and therefore offered to give plaintiff ten dollars for them; plaintiff assented, and gave the defendant a bill of sale. On discovering these facts, plaintiff brought the suit to recover back the sheep and rescind the sale, and the suit was sustained. The court said that the defendant might have kept silence, but the remark which he volunteered was plainly designed to mislead the plaintiff, and was a fraudulent concealment and misrepresentation. These cases were actions at law, but they illustrate the doctrine in equity as well as at law.

tion of perfect good faith and of complete disclosure always arises from the existing relations of trust and confidence, and is necessarily impressed upon any transaction which takes place between such persons. Familiar examples are contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like. (2) The second class embraces those instances in which there is no existing special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary, but it appears that either one or each of the parties, in entering into the contract or other transaction, *expressly* reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is *necessarily* implied. The nature of the transaction is not the test in this class. Each case must depend upon its own circumstances. The trust and confidence, and the consequent duty to disclose, may expressly appear by the the very language of the parties; or they may be necessarily implied from their acts and other circumstances.[1] (3) The third class includes those instances where there is no existing fiduciary relation between the parties, and no *special* confidence reposed is expressed by their words or implied from their acts, but the very contract or other transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect

[1] Cases illustrating fiduciary relation and duty to disclose from the particular circumstances of the transaction. Bowles v. Stewart, 1 Sch. & Lef. 209, 224; Roddy v. Williams, 3 Jo. & Lat. 1; Gordon v. Gordon, 3 Sw. 490; Leonard v. Leonard, 2 Ball & B. 171; Broderick v. Broderick, 1 P. Wms. 239; Rolt v. White, 3 De G. J. & S. 360, 365, *per* Lord Westbury; Mangles v. Dixon, 1 Macn. & G. 437; 3 H. L. Cas. 702; Mackay v. Douglas, Id., 14 Eq. 106; Dicconson v. Talbot, L. R., 6 Ch. 32; Vane v. Vane, Id., 8 Ch. 383; Stanley v. Stanley, Id., 7 Ch. D. 589; Hanson v. Edgerly, 29 N. H. 343; Fitzsimmons v. Joslin, 21 Vt. 129; Howard v. Gould, 28 Id. 523; Paddock v. Strobridge, 29 Id. 470; Bank of Republic v. Baxter, 31 Id. 101; Brown v. Montgomery, 20 N. Y. 287; Schiffer v. Dietz, 83 Id. 300; Hadley v. Clinton etc. Co., 13 Ohio St. 502.

Cases illustrating duty to disclose on account of pre-existing fiduciary relations: McLure v. Ripley, 2 Macn. & G. 274; Loader v. Clarke, 2 Id. 382; Atterbury v. Wallis, 8 De G. M. & G. 454; Evans v. Carrington, 2 De G. F. & J. 481; Tate v. Williamson, L. R., 1 Eq. 528; 2 Ch. 55; Gen. Exch. Bk. v. Horner, Id., 9 Eq. 480; Peek v. Gurney, Id., 13 Eq. 79; *In re* Madrid Bk., Id., 2 Eq., 216; *In re* Overend etc. Co., Id., 3 Eq. 576; Heymann v. European etc. Co., Id., 7 Eq. 154; *In re* Coal etc. Co., Id., 20 Eq. 111; Overend etc. Co. v. Gurney, Id., 4 Ch. 701; *In re* Lush's Trusts, Id., 4 Ch. 591; Sharpe v. Foy, Id., 4 Ch. 35; *In re* Coal etc. Co., Id., 1 Ch. D. 182; *In re* Hereford etc. Co., Id., 2 Ch. D. 621; Craig v. Phillips, Id., 3 Ch. D. 722; Morgan v. Elford, Id., 4 Ch. 352; New Sombrero etc. Co. v. Erlanger, Id., 5 Ch. D. 73; Bagnall v. Carlton, Id., 6 Ch. D. 371; Davies v. London etc. Co., Id., 8 Ch. D. 469; Lovesy v. Smith, Id., 15 Ch. D. 655; Young v. Hughes, 32 N. J. Eq. 372.

good faith and full disclosure, without regard to any particular intention of the parties. The contract of insurance is a familiar example. It will be found, I think, that all cases of fraudulent concealment may be referred to one or the other of these classes.

§ 903. **Concealments by a Vendee.**—As instances of concealment are most frequent in contracts of sale, it will be proper to apply the foregoing general doctrine to the vendee and the vendor. The decisions recognize a marked difference between the two, with reference to their duty to disclose. The contract of sale is not intrinsically fiduciary, and does not fall within the third of the foregoing classes. The conclusion is clearly established, that under ordinary circumstances, there being no previously existing fiduciary relation between the parties, and no confidence being expressly reposed by the vendor in the very contract, no duty rests upon the vendee to disclose facts which he may happen to know advantageous to the vendor, facts concerning the thing to be sold which would enhance its value, or tend to cause the vendor to demand a higher price, and the like; so that a failure to disclose will not be a fraudulent concealment.[1] The reason is evident. The law assumes that the owner has better opportunities than any one else to know all the material facts

[1] In the leading case of Fox v. Mackreth, 2 Cox, 320; 2 Bro. Ch. 400, 420, Lord Thurlow thus stated this doctrine: "Suppose A., knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, by reason of not disclosing to B. the fact of the existence of the mine; can a court of equity set aside this bargain? No. But why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge; but because there is no contract existing between them by which one party is bound to disclose to the other the circumstances which have come within his knowledge; for if it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is therefore not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from superiority of skill or information, but it is also necessary to show *some obligation binding the party to make such a disclosure.*" To the same general effect, see Dolman v. Nokes, 22 Beav. 402; Dicconson v. Talbot, L. R., 6 Ch. 32.

Livingston v. Peru Iron Co., 2 Paige, 390; Harris v. Tyson, 12 Harris (24 Pa. St.), 347; Drake v. Collins, 5 How. (Miss.) 253; Williams v. Spurr, 24 Mich. 335; Law v. Grant, 37 Wisc. 548; see, however, *per contra*, Bowman v. Bates, 2 Bibb, 47; Williams v. Beazley, 3 J. J. Marsh. 578. In Bowman v. Bates, a person discovered a valuable salt spring on another's land, and bought the tract from him at an ordinary price, without disclosing his discovery. The sale was, for that reason, set aside. One cannot help admiring the stern morality of this decision, even if it be not sustained by the current of authority. See, also, as illustrating the general rule, Laidlaw v. Organ, 2 Wheat. 178, 195; Goninan v. Stephenson, 24 Wisc. 75; Cleland v. Fish, 43 Ill. 282; Wright v. Brown, 67 N. Y. 1; Anonymous, 67 Id. 598.

concerning his own property, and is thus able under all ordinary circumstances to protect his own interests. The duty to disclose can rest upon the vendee only when the case belongs either to the first or the second of the above-mentioned classes. If, therefore, there is a confidence reposed by the vendor in the vendee, by reason of some prior existing fiduciary relation between them, the vendee's failure to disclose a material fact would undoubtedly be a fraudulent concealment. Also, if during the negotiation and conclusion of the sale, confidence is expressly reposed in the vendee, or if from the circumstances of the contract and the acts of the parties, such confidence is necessarily implied, the vendee's silence might be a fraudulent concealment. In instances of the latter kind, a much stronger and clearer case of confidence and consequent duty to disclose is necessary against the vendee, than would be required under analogous circumstances against the vendor.[1]

§ 904. **Concealments by a Vendor.**—A broader duty certainly rests upon the vendor; a duty rests on him to disclose material facts under far more circumstances than is true of the purchaser. This duty, however, is not universal. In ordinary contracts of sale, where no previous fiduciary relation exists, and where no confidence, expressed or implied, growing out of or connected with the very transaction itself, is reposed on the vendor, and the parties are dealing with each other at arms' length, and the purchaser is presumed to have as many reasonable opportunities for ascertaining all the facts as any other person in his place would have had, then the general doctrine already stated applies; no duty to disclose material facts known to himself rests upon the vendor; his failure to disclose is not a fraudulent concealment.[2] Of course any *affirmative* act or

[1] Tate v. Williamson, L. R., 2 Ch. 55; 1 Eq. 528, is a very instructive case of fraudulent concealment by a vendee by reason of an existing fiduciary relation. While a vendee's silence in the absence of any existing fiduciary relations, will not ordinarily be a fraudulent concealment unless the fact of confidence reposed by the vendor is clearly made out; yet such confidence may be more easily inferred, and the duty to disclose may more readily arise, when the material facts concealed are wrongful acts with respect to the subject-matter, knowingly done by the vendee himself. Phillips v. Homfray, L. R., 6 Ch. 770, is an illustration. The owner of a colliery contracted to purchase an adjoining mine from the proprietor thereof. The vendee concealed the fact that he had already got out a considerable quantity of coal from the vendor's mine, without the latter's knowledge. This concealment was held to be fraudulent and to defeat the contract, although it did not appear there had been any undervaluation of the mine on account of the coal taken. See, also, Emmons v. Moore, 85 Ill. 304; Cleland v. Fish, 43 Id. 282; Young v. Hughes, 32 N. J. Eq. 372; Connelly v. Fisher, 3 Tenn. Ch. 382; Dameron v. Jamison, 4 Mo. App. 299.

[2] Haywood v. Cope, 25 Beav. 140; Wilde v. Gibson, 1 H. L. Cas. 605; Gibson v. D'Este, 2 Y. & C. Ch. 542;

language tending to conceal or withdraw the buyer's attention from the real facts, will turn the scale and render the vendor's conduct fraudulent, as has already been shown. If, on the other hand, the case belongs to the first class mentioned in a former paragraph, the duty of disclosure becomes manifest and stringent. Whenever the vendor occupies an established fiduciary relation towards the buyer, independent of the contract, a full disclosure is demanded; any suppression or silence as to material facts, which would in any degree tend to prevent the sale, is clearly a fraudulent concealment; the utmost good faith and openness is required of vendors occupying such relations.[1] Equity and the law go farther than this. Not only where the vendor thus occupies a fiduciary position towards the purchaser, independently of the sale, but also when, in the very contract of sale itself, or in the negotiations preliminary to it, the purchaser *expressly* reposes a trust and confidence in the vendor, and when from circumstances of that very transaction, or from the acts or relations of the parties in connection with it, such a trust and confidence reposed by the purchaser is necessarily *implied* in the contract of sale, it is the duty of the vendor to make a like disclosure, and his failure to do so is a fraudulent concealment.[2]

People's B'k v. Bogart, 81 N. Y. 101; Smith v. Countryman, 30 Id. 655; Hanson v. Edgerly, 29 N. H. 343; Fisher v. Budlong, 10 R. I. 525; Kintzing v. McElrath, 5 Barr. 467; Hadley v. Clinton etc. Co., 13 Ohio St. 502; Frenzel v. Miller, 37 Ind. 1; Williams v. Spurr, 24 Mich. 335; Mitchell v. McDougall, 62 Ill. 498; Law v. Grant, 37 Wisc. 548; Laidlaw v. Organ, 2 Wheat. 178; Hastings v. O'Donnell, 40 Cal. 148.

In Haywood v. Cope, *supra*, it was held that the vendor's mere failure to disclose acts as having been done by himself, when the buyer must necessarily have known that they were done by somebody, is not only not a fraudulent concealment, but is even not a sufficient ground for defeating a suit for a specific performance brought by the vendor. Plaintiff had worked coal under his land, and had abandoned it as unprofitable. Twenty years after, defendant cleaned out the pit, examined the coal in the shaft with other persons, and then entered into a contract for a lease. The mine turned out to be worthless. Sir John Romilly, M. R., held that defendant had no ground of defense because plaintiff did not communicate the fact that *he* had worked and abandoned the mine, since the defendant, from his own personal examination, must have known that it had been worked and abandoned by some one.

[1] These cases of dealings between agent and principal, attorney and client, trustee and beneficiary, and the like, are discussed in subsequent sections; cases illustrating the rule alluded to in the text will be found in that connection. See, also, cases cited *ante* under § 902 on fiduciary relations.

[2] It is impossible to formulate a rule, applicable to the situation intended to be described, more definite than this. When it appears that the purchaser has in express terms reposed a confidence in the vendor, there can be no doubt or difficulty. The difficulty arises where such confidence must be implied or inferred. With respect to *this* situation of the parties, the decisions, it must be confessed, are not harmonious; many of them seem to be separated by a very shadowy line. The truth probably is, that the apparent conflict among the decisions

§ 905. **Non-disclosure of Facts, a Defense to the Specific Enforcement of Contracts in Equity.**—Although the discussion relates to fraudulent concealments, such as necessarily imply knowledge and an intent not to communicate the fact, it is proper to notice one other rule affecting the relations between the vendor and purchaser in equity. A fraudulent concealment, defeating a contract of sale at law, and furnishing ground for its cancellation in equity, is, of course, a complete defense to its specific performance. In addition to these concealments properly so called, the suppression of a material fact, or the failure to communicate a material fact by the vendor, without any purpose of deceiving or misleading the other party, and even without having himself any knowledge of the fact, while not affecting the validity of the agreement at law, and not being sufficient ground for its cancellation in equity, because not fraudulent, may still render the agreement so unfair, unequal, or hard, that a court of equity, in accordance with its settled principles in administering the remedy of specific performance, will refuse to enforce the contract against the party who was misled. The two contracting parties do not stand upon an equality; either one had a knowledge of important facts of which the other was ignorant, or else there was a mistake by one or perhaps by both. Such misdescription, consisting of omitting material particulars, how-

is due more to a difference in the effect of evidence, and in the conclusions of fact, than to any difference in the rules of law recognized and acted upon by the courts. Where the confidence reposed must be implied or inferred from the circumstances of the transaction, each case must turn upon its own particular facts. Gibson v. D'Este, 2 Y. & C. Ch. 542; Wilde v. Gibson, 1 H. L. Cas. 605; Edwards v. McLeay, 2 Sw. 287; Coop. 308; Dolman v. Nokes, 22 Beav. 402; Haywood v. Cope, 25 Id. 140; Brown v. Montgomery, 20 N. Y. 287; People's B'k v. Bogart, 81 Id. 101; Rawdon v. Blatchford, 1 Sandf. Ch. 344; Paddock v. Strobridge, 29 Vt. 470, 477; Holmes's Appeal, 77 Pa. St. 50; Snelson v. Franklin, 6 Munf. 210; McNeil v. Baird, Id. 316; Halls v. Thompson, 1 Sm. & Mar. 443; Roseman v. Canovan, 43 Cal. 110; Schiffer v. Dietz, 83 N. Y. 300; Howell v. Biddlecom, 62 Barb. 131; Clark v. Bamer, 2 Lans. 67; Bank of Republic v. Baxter, 31 Vt. 101; Howard v. Gould, 28 Id. 523; Fitzsimmons v. Joslin, 21 Id. 129; Hanson v. Edgerly, 29 N. H. 343.

Brown v. Montgomery, *supra*, is a very illustrative case of confidence implied from the circumstances of the particular sale. It doubtless stands on the border line, but has not been overruled, nor even questioned so as to shake its authority. The vendor sold a check of a third party. At the time of the sale he knew that other checks of the same maker had been dishonored on that very day and the day before, but did not communicate this fact to the buyer. The check turned out worthless, as the maker had become insolvent. Held to be fraudulent concealment. The able opinion of Denio, J., holds that under the circumstances, from the nature of the transfer, and of the check itself, a confidence reposed by the buyer in the vendor was implied; the character of a check as a mercantile instrument, representing as it does that so much money *then* lies on deposit awaiting presentation, created a fiduciary duty on the vendor's part; the vendor was therefore bound to disclose.

ever free of wrongful intent they may be, have often been held a sufficient defense to suits for specific enforcement.[1]

§ 906. **Concealments by Buyers on Credit.**—The particular case of the buyer on credit who conceals his bad financial condition, requires a brief additional mention, because it is the most common species of fraud, and because it involves one or two special rules. As to what constitutes a false representation by such a buyer, nothing need be added, except that in this instance especially, the statement of the buyer must be something more than the mere expression of an opinion as to his pecuniary ability. As to what constitutes a fraudulent concealment under these circumstances, there has been some uncertainty and even conflict of decision in determining what matters such buyer is bound to disclose, so that his failure to do so would be a fraud. The following rules may be regarded as settled by the decided weight of authority; they are certainly sustained by courts of the greatest ability and influence. (1) The purchaser when buying on credit is not bound to disclose the facts of his financial condition. If he makes no actual misrepresentation, if he is not asked any questions and does not give thereto any untrue, evasive, or partial answers, his mere silence as to his general bad pecuniary condition, his indebtedness, or even his insolvency, will not constitute a fraudulent concealment. (2) If, however, the former *good* financial condition of the buyer has been known to the vendor through prior dealings or otherwise, and any sudden or complete change has happened to the buyer, such as his sudden loss of property by fire or other accident, or his sudden insolvency or embarrassment by the failure of others, or a general assignment which he has made of all his property, and the like, he is bound to disclose such facts to the vendor previously to the completion of the sale; his *mere* silence with respect to such changes in his condition, even when no questions are asked of him, is a fraudulent concealment. (3) Finally, if at the time he purchases the goods on credit, and fails to disclose his general insolvency, embarrassed condition, or indebtedness, the buyer forms or has in his mind the intention or design of not paying for them, this is a fraud on his part. In other words, a purchase on credit with a preconceived design on the buyer's part, formed at or

[1] Shirley v. Stratton, 1 Bro. Ch. 440; Deane v. Rastron, 1 Anstr. 64; Ellard v. Lord Llandaff, 1 Ball & B. 241; Hesse v. Briant, 6 De G. M. & G. 623; Maddeford v. Austwick, 1 Sim. 89; Bonnett v. Sadler, 14 Ves. 526; Drysdale v. Mace, 5 De G. M. & G. 103; Baskcomb v. Beckwith, L. R., 8 Eq. 100; Lucas v. James, 7 Hare, 410; Denny v. Hancock, L. R., 6 Ch. I.

before the purchase, not to pay for the thing bought, constitutes a species of fraudulent concealment.[1]

§ 907. **Contracts and Transactions Essentially Fiduciary.**—Wherever a contract is in its essential nature intrinsically fiduciary, the utmost good faith and the fullest disclosure of material facts are required from the parties, without any reference to their prior or collateral relations, or to the circumstances surrounding the particular transaction. Any concealment of a material fact known to a party would necessarily be fraudulent. The most familiar and illustrative example of such contracts is that of insurance.[2] The contract of suretyship, in the relations between the surety and the other parties, and especially the creditor, is also fiduciary, although not in the same degree as that of insurance. It demands good faith towards the surety, and while the creditor is not absolutely bound voluntarily to disclose every fact which might affect the contract, very slight incidents and collateral circumstances will render his concealment of material facts fraudulent.[3]

§ 908. **Liability of Principals for the Frauds of their Agents.**—The general question as to the authority, express or implied, of agents to bind their principals and to render those principals liable for any kind of remedy, legal or equitable, by means of fraudulent representations or concealments; and the more special questions as to the implied authority held by di-

[1] Cary v. Hotailing, 1 Hill, 311; Bigelow v. Heaton, 6 Id. 43; Mitchell v. Worden, 20 Barb. 253; Nichols v. Pinner, 18 N. Y. 295; 23 Id. 264 (in this case the subject was fully examined, and the three rules given in the text were laid down); Hennequin v. Naylor, 24 Id. 139; King v. Phillips, 8 Bosw. 603; Bell v. Ellis, 33 Cal. 620, 626, expressly overruling and repudiating the contrary view maintained in Seligman v. Kalkman, 8 Id. 207; Hathorne v. Hodges, 28 N. Y. 486, illustrates the kind of indirect evidence admissible to show the buyer's fraudulent design.

[2] The subject of insurance is so broad, the questions arising under the general duty of the assured to make disclosure are so numerous, that I can only refer to the treatises upon the law of insurance in which they are discussed. See, also, 1 Smith Lead. Cas. 843, notes to Carter v. Boehm; and 2 American Lead. Cas. 926, notes to Locke v. Am. Ins. Co.

[3] There are some *dicta* and even decisions that the contract of suretyship is in all respects identical with that of insurance in relation to the obligation of full disclosure. These *dicta* and decisions have been overruled, and the doctrine as now settled in England and the United States, regards the contract of suretyship as partially fiduciary. The whole subject is fully examined in the following cases: Wythes v. Labouchere, 3 De G. & J. 593; Owen v. Homan, 4 H. L. Cas. 997; 3 Macn. & G. 378; Hamilton v. Watson, 12 Cl. & Fin. 109; Pidcock v. Bishop, 3 B. & C. 605; North Br. Ins. Co. v. Lloyd, 10 Exch. 523; Stone v. Compton; 5 Bing. N. C. 142; 6 Scott, 846; Maitland v. Irving, 15 Sim. 437; Squire v. Whitton, 1 H. L. Cas. 333; Railton v. Mathews, 10 Cl. & Fin. 934; Carew's Case, 7 De G. M. & G. 43; Etting v. Bank of U. S., 11 Wheat. 59; Howe Machine Co. v. Farrington, 82 N. Y. 121; Sooy v. The State, 39 N. J. Law, 135; Atlas B'k v. Brownell, 9 R. I. 168; Franklin B'k v. Cooper, 36 Me. 179, 195; Evans v. Keeland, 9 Ala. 42.

rectors, trustees, managers, officers, employees, and the like, inherent in their official or representative position, to bind their corporations, stockholders, beneficiaries, co-directors, associates, or employers, by their fraudulent representations or concealments, and to render the latter classes of persons liable, on account of the fraud, for any species of remedy, equitable or legal, do not come within the scope of this book; they belong to the law of agency. I shall attempt no discussion of them, and for their treatment the reader is referred to works professedly on the law of agency. It is proper to say, however, that there seems to be a marked difference between the conclusions upon these latter questions, reached by the more recent English decisions, and those maintained by the American cases. The tendency of the English courts has been very strong, to take a very strict and narrow view of the powers and liabilities of directors, officers, trustees, and the corporations, stockholders, co-directors, and other beneficiaries whom they represent. On the other hand, the general tendency of the American decisions is to enlarge the implied authority of such officials, and to extend the liability created by their frauds and resting upon corporations, stockholders, and co-directors. The question as to the extent of liability incurred by corporations, stockholders, co-directors, co-trustees, and the like, for the frauds and breaches of duty of officers, directors, and trustees, will be treated of in a subsequent section which deals with the particular subject of fiduciary relations. At present I shall simply state the general rules which define the liability of principals for the fraudulent representations and concealments of their agents, when such fraudulent acts are within the scope of the authority, express or implied, possessed by the agent, without any attempt to discuss the nature, extent, and limits of the authority itself.

§ 909. **The Same.**—In the first place, it is very clear that when an agent, in doing the business of his principal, and acting within the scope of the authority conferred upon him, makes fraudulent representations or concealments with the knowledge or consent of his principal, expressed or implied, so that the act of the agent is virtually that of his principal, then the principal is liable in the same manner, to the same extent, and for the same remedies, as though the fraud were committed by himself personally; he may even be liable in an action at law for deceit. The doctrine is carried much farther. When the agent acts beyond and even in direct opposition to his express authority, but within the scope of his implied authority, that is,

within the *apparent* authority contained in and conferred by the terms of his commission, or the nature of his official functions or of his employment, or appearing from a prior course of dealing with or on behalf of his principal, or from any other mode of his being held out to the world as appearing to possess the authority, and the principal is personally innocent of any fraud, the principal can not acquire and retain any benefit obtained under such circumstances from the fraud, representations, or concealments. If the principal, upon learning of his agent's fraud, should expressly ratify and adopt the transaction, he would make the fraud his own. An express ratification, however, is not necessary. If the principal receives and retains the proceeds of the agent's fraud—the property, money, and the like obtained through an executed transaction—or claims the benefit of or attempts to enforce an executory obligation thus procured, he renders himself liable for the fraudulent acts of his agent. The defrauded party is entitled to such remedies, legal or equitable, as are appropriate to the nature of the transaction. The only mode in which the principal, under these circumstances, can escape liability, is by repudiating the acts of his agent, and refusing to accept or retain any benefit of the transaction, immediately upon his discovery of the fraud. Many American decisions go much farther than this. They hold that, where an agent has thus committed a fraud, within the scope of his *apparent* authority, though in direct opposition to his express instructions, the principal is bound by the act, even though he is personally innocent, and has derived no benefit whatever from the fraudulent transaction of his agent.[1]

[1] The following cases furnish illustrations of the conclusions stated in the text, and also of the differences between the tendencies of English and American decisions. Gibson v. D'Este, 2 Y. & C. 542; 1 H. L. Cas. 605; Conybeare v. New Brunswick etc. Co., 1 De G. F. & J. 578; S. C., 9 H. L. Cas. 711, 726, *per* Lord Westbury, 730, *per* Lord Cranworth; Bristow v. Whitmore, 9 H. L. Cas. 418; Gibson's Case, 2 De G. & J. 275; Nicol's Case, 3 Id. 387, 437; Udell v. Atherton, 7 H. & N. 172; Fuller v. Wilson, 3 Q. B. 58; Cornfoot v. Fowke, 6 M. & W. 358; Moens v. Heyworth, 10 Id. 147; Bondfoot v. Montefiore, L. R., 2 Q. B. 511; Mackay v. Commer. Bank, Id., 5 P. C. 394; Burnes v. Pennell, 2 H. L. Cas. 497; Ranger v. Great West Ry., 5 H. L. Cas. 72; National Exch. Co. v. Drew, 2 Macq. 103, 125; Meux's Executors' Case, 2 De G. M. & G. 522; Oakes v. Turquand, L. R., 2 H. L. 325; Sutton v. Wilders, Id., 12 Eq. 373; Earl of Dundonald v. Masterman, Id., 7 Eq. 504; Scholefield v. Templer, Johns. 155; Hartopp v. Hartopp, 21 Beav. 259; Western Bk. v. Addie, L. R., 1 Sc. App. 145; Veazie v. Williams, 8 How. (U. S.) 134; Mason v. Crosby, 1 Wood. & M. 342; Fitzsimmons v. Joslin, 21 Vt. 129; Concord Bk. v. Gregg, 14 N. H. 331; Coddington v. Goddard, 16 Gray, 436; Litchfield Bk. v. Peck, 29 Conn. 384; Van Wyck v. Watters, 81 N. Y. 352; Fishkill Sav. Inst. v. Nat. Bk. of Fishkill, 80 Id. 162; Bennett v. Judson, 21 Id. 238; Elwell v. Chamberlain, 31 Id. 611; Condit v. Baldwin, 21 Id. 219; Bell v. Day, 32 Id. 165; Smith v. Tracy, 36 Id. 79; Estevez v. Purdy, 66 Id. 446; Durst v. Burton, 47 Id. 167; Allerton

§ 910. **Jurisdiction of Equity in Cases of Fraud.** — It is impossible, especially in the United States, to formulate any *universal* rules concerning the extent or the exercise of the equitable jurisdiction in matters of fraud, since the decisions of different courts and in different states are directly at variance with respect to its existence and extent, and since its exercise must depend, to a great extent, upon the circumstances of particular cases, and even upon the temperaments and opinions of individual judges. The jurisdiction, when it exists, may be exercised by granting reliefs which are peculiarly equitable, or reliefs which are wholly pecuniary and therefore legal. In conferring these reliefs which are purely equitable and therefore exclusive, the power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar. The most important of these equitable final reliefs, to one or the other of which all special instances and forms may be reduced, are these; rescission or cancellation, as applied to contracts, conveyances, judgments, and all fraudulent transactions, with one marked exception; reformation of written instruments improperly drawn through fraud; and specific enforcement by which the fraudulent party is compelled to perform the very specific obligation which rests upon him, and the defrauded party obtains the enjoyment of the very right of which he was deprived through the fraud. This latter class

v. Allerton, 50 Id. 670; Titus v. Great West T. Co., 61 Id. 237; Davis v. Bemis, 40 Id. 453, n.; Indianapolis etc. R. R. v. Tyng, 63 Id. 653; Hathaway v. Johnson, 55 Id. 93; Durst v. Burton, 2 Lans. 137; Graves v. Spier, 58 Barb. 349; Young v. Hughes, 32 N. J. Eq. 372; Mundorff v. Wickersham, 63 Pa. St. 87; Custar v. Titusville etc. Co., 63 Id. 381; Crossman v. Penrose Bdg. Co., 2 Casey, 69; Crump v. U. S. Mining Co., 7 Gratt. 352; River v. Plankroad Co., 30 Ala. 92; Bowers v. Johnson, 10 Sm. & M. 169; Lawrence v. Hand, 23 Miss. 103; Hester v. Memphis etc. R. R., 32 Id. 378; Mitchell v. Mims, 8 Tex. 6; Henderson v. Railroad, Co., 17 Id. 560; Morton v. Scull, 23 Ark. 289; East Tenn. R. R. v. Gammon, 5 Sneed, 567; Negley v. Lindsay, 67 Pa. St. 217; Mendenhall v. Treadway, 44 Ind. 131; Boland v. Whitman, 33 Id. 64; Shawmut etc. Co. v. Stevens, 9 Allen, 332; Fogg v. Griffin, 2 Id. 1. For instances in which the fraud of persons not in a relation of agency is not ground for relief, see Root v. Bancroft, 8 Gray, 619; Lepper v. Nuttman, 35 Ind. 384; Wright v. Flinn, 33 Iowa, 159; Cummings v. Thompson, 18 Minn. 246; Fisher v. Boody, 1 Curtis C. C. 206. In the following series of remarkable cases, principals were held liable for fraud of their agents, done simply within the *apparent* scope of their authority, although the principal had received no benefit whatever from the transaction, and in many of the cases the principal was a corporation, and its agent an officer thereof. North River Bk. v. Aymar, 3 Hill, 262; Farmers & Mech. Bk. v. Butchers etc. Bk., 16 N. Y. 125; 14 Id. 623; Griswold v. Haven, 25 Id. 595; Exchange Bk. v. Monteath, 26 Id. 505; N. Y. & N. H. R. R. v. Schuyler, 34 Id. 30; Cutting v. Marlor, 78 Id. 454; Armour v. Mich. Cent. R. R., 65 Id. 111, 121–124; but see *per contra*, Mechanic's Bk. v. N. Y. & N. H. R. R., 13 Id. 599, which must be regarded as entirely overruled by the subsequent cases.

of remedies may assume an unlimited variety of forms as the circumstances may require. It includes, among others, the compelling the fraudulent party to make good his representations; the treating him as a trustee with respect to the property which he has acquired by his fraud; the enforcing the performance of their specific duties by trustees, directors, and officers of corporations, and all others who stand in a position of trust; the compelling a written security to stand good for what is actually due upon it, and the like. These final remedies may be accompanied and aided by auxiliary reliefs, such as injunction or a receiver. The purely pecuniary relief which courts of equity may administer, as well as courts of law, in matters of fraud, are an accounting in all its various forms and conditions, and simple recoveries, without an accounting, of specific amounts of money which have been fraudulently obtained, or which are equitable and perhaps legally due on account of fraud. In administering all these remedies, pecuniary as well as equitable, the fundamental theory upon which equity acts is that of restoration—of restoring the defrauded party primarily, and the fraudulent party as a necessary incident, to the positions which they occupied before the fraud was committed. Assuming that the transaction ought not to have taken place, the court proceeds as though it had not taken place, and returns the parties to that situation. Even in such cases, the court applies the maxim, he who seeks equity must do equity, and will thus secure to the wrong-doer, in awarding its relief, whatever is justly and equitably his due.[1] All these forms of exclusively equitable relief, and the remedy of accounting, will be examined in subsequent chapters. At present, I purpose to state, as far as is possible, the general rules concerning the existence, extent, and exercise of the jurisdiction, and to add some examples illustrating the instances in which the jurisdiction is and is not exercised.

§ 911. **Fundamental Principles of the Jurisdiction.**—It may be an aid in the present inquiry, to recall the three fundamental principles concerning the equitable jurisdiction, which

[1] The remedies of cancellation, reformation, and enforcing fiduciary duties are so familiar that they require no citation of examples. For examples of compelling the fraudulent party to make good his representations, see cases cited *ante* under § 899. Examples of treating a fraudulent party as a trustee: Gresley v. Mousley, 4 De G. & J. 78; Stump v. Gaby, 2 De G. M. & G. 623; and see *post*, section on constructive trusts. Example of ordering a security to stand for what was really due on it: Neilson v. McDonald, 6 Johns. Ch. 201. The equitable theory of restoring the parties to their original position: Savery v. King, 5 H. L. Cas. 627; Bellamy v. Sabine, 2 Phil. 425; Neblett v. Macfarland, 2 Otto, 101; Grymes v. Sanders, 3 Id. 55; Johnson v. Jones, 13 Sm. & M. 580; Gatling v. Newell, 9 Ind. 572.

were laid down and explained in the former volume. (1) Where the primary right or interest of the plaintiff is equitable only, the jurisdiction is necessarily exclusive, and will always be exercised without regard to the nature of the relief; otherwise the party would be without remedy, since courts of law could not take cognizance of the case. (2) Where the primary right is legal, and the remedy sought is purely equitable, the jurisdiction is also exclusive, and always exists, but will not generally be exercised if the legal remedy which the party might obtain is adequate, complete, and certain. (3) Where the primary right is legal and the remedy is also legal, a recovery of money simply, or of the possession of chattels, the jurisdiction is concurrent, and only exists when the remedy which the party might obtain at law is not adequate. The great majority of cases arising from fraud undoubtedly fall under the second or third of these principles. It should be observed that, in the original condition of the jurisdiction, and in those courts of this country which preserve the original methods of equity, the jurisdiction might be extended over many instances otherwise belonging to the third class, by reason of the auxiliary relief of a discovery.

§ 912. **The English Doctrine.**—The doctrine is fully settled by an unbroken line of decisions extending to the present day, that with one remarkable exception, the jurisdiction of equity exists in and may be extended over *every* case of fraud, whether the primary rights of the parties are legal or equitable, and whether the remedies sought are equitable or simple pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case and can administer the same kind of relief. The English judges have virtually said that in every case of fraud the remedy at law, either from the nature of the legal relief itself or from the methods of legal procedure, is inadequate. The only question, therefore, presented to an English court is, not whether the equitable jurisdiction *exists*, but whether it should be exercised.[1] As the ablest judges have

[1] It will be proper to present the views of the English courts on this question, for the long line of chancellors and other equity judges may be supposed to know, at least, the jurisdiction of their own tribunal. I select recent cases, and those in which the recovery was pecuniary, and in which there was confessedly a concurrent jurisdiction at law. Hill v. Lane, L. R., 11 Eq. 215, was a suit brought simply to recover back the money which plaintiff had paid for certain shares of stock purchased from defendants in reliance upon their false and fraudulent representations. The bill was demurred to. V. C. Stuart said (p. 220): "In support of the demurrer it was argued that the proper remedy for the plaintiff, if he had any, was to proceed by action at law. It has often been decided that this court will grant relief in such cases. * * * It is so well settled that this court will entertain jurisdiction in such cases, that it would be a misfortune,

often said, one of the occasions for the existence of a separate court of chancery was its power to deal with all cases of fraud; its original grant of jurisdiction covered fraud in all its forms and phases. The law courts, on the other hand, originally had

indeed, to the public if there were any sufficient ground for considering that the jurisdiction is doubtful." [He cites the opinions of Lord Eldon, Sir Wm. Grant, Sir John Leach, and other eminent judges, and adds.] "So long ago as the case of Colt v. Woollaston, 2 P. Wms. 154, 156, the M. R. said: 'It is no objection that the parties have their remedy at law, and may bring an action for moneys had and received for the plaintiff's own use, for in cases of fraud the court of equity has concurrent jurisdiction with the common law, matter of fraud being the great subject of relief here.'" The V. C. also held that the decision in Ogilvie v. Currie, 37 L. J. (Ch.) 541, *per* Lord Cairns, was not in opposition to his own conclusion, and if a *dictum* in that case appeared to be opposed, it was in direct conflict with an unbroken current of authority. In Ramshire v. Bolton, L. R., 8 Eq. 294, the bill alleged that at the defendant's request, he advanced to a third person, who was the drawer, one half of the amount of a bill of exchange drawn for five hundred pounds; that the advance was made upon defendant's promise to advance the other half, and his representations that the drawer and acceptor were both men of large property; that defendant's representations were intentionally false and fraudulent; that he knew the parties to the bill were utterly insolvent and that it was worthless; that he made no advance himself; but the whole was a scheme to obtain money for himself. The relief demanded was repayment of the money from the defendant personally. The bill was demurred to on the ground that the remedy was wholly at law. Malins, V. C., said (p. 299): "No one can say that the bill does not allege a case entitling the plaintiff to recover the money at law; but the question is, whether the remedy is not in this court as well as at law." The V. C. having said that the facts brought the case within the principle of Pasley v. Freeman, 3 T. R. 51, and having cited instances in which equity had taken jurisdiction of similar cases, he proceeded: "Lord Eldon, in Evans v. Bicknell, 6 Ves. 174, 182, declared that the case of Pasley v. Freeman, and all others of that class, were more fit for a court of equity than a court of law, and was clearly of opinion that at least there is concurrent jurisdiction, and he says: 'It has occurred to me that that case, upon the principles of many decisions of this court, might have been maintained here; for it is a very old head of equity that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false.' Can anything be more conclusive?" In St. Aubyn v. Smart, L. R., 5 Eq. 183, the defendant and one Buller had been partners as attorneys at law. Plaintiff employed the firm to obtain a sum of money due to him, being part of a fund in charge of a court. Buller attended to the business, obtained the money in his own name, and absconded with it. The suit is brought to make the defendant liable for this fraud of his copartner. The bill did not pray for an accounting, but simply to recover the sum of money. Demurrer on ground of want of jurisdiction. The V. C. said (p. 188): "Upon a careful consideration of the authorities I am perfectly satisfied that, even if there be a remedy at law, there is also one in equity. The jurisdiction was clearly stated by Sir James Wigram in Blair v. Bromley, 5 Hare, 556; 2 Phil. 361, confirmed by Lord Lyndhurst on appeal; who in the course of his judgment said, that in all the cases to which he had referred, the effect of a misrepresentation raised an equity to restore the parties as nearly as possible to the same situation in which they would have stood but for the misrepresentation, and for which damages in an action at law might be a very inadequate remedy; and that the fact that an action at law would lie was no objection to such equity." This decision was affirmed by the court of appeal, consisting of Page-Wood (Lord Hatherly) and Selwyn, LL. JJ., on the ground of the general jurisdiction of

very little, if any, jurisdiction in such matters. In the early forms of action to enforce covenants, debts, and other obligations *ex contractu*, fraud was not admitted as a defense; and

equity in matters of fraud. S. C., L. R., 3 Ch. 646, 650. The celebrated case of Slim v. Croucher, 1 De G. F. & J. 518, is a most instructive and convincing authority. Plaintiff was applied to for a loan upon the security of a lease, and was told by the borrower that he was entitled to a renewal of the lease for ninety-eight years from his lessor. Plaintiff required a written statement from the lessor of that fact. The lessor furnished such a statement, and on the faith of it plaintiff made the loan. It turned out that the lessor had already executed the renewal lease to the borrower, who had assigned it to a third person for value; at the time he made his statement the lessor had forgotten the fact. Plaintiff sues the lessor to recover the sum advanced with interest. The court of appeal, Lord Chan. Campbell, and LL. JJ. Turner and Knight-Bruce, held that the defendant's misrepresentation was fraud in equity though not an intentional moral wrong; that he was liable; and that equity had jurisdiction. Lord Campbell said (p. 523): "The defense set up in the suit is, that there was a remedy at law, and that that is the only remedy competent to the plaintiff. Now that there was a remedy at law I think is quite clear; there is no doubt in my mind that an action would lie, and that it would be for a jury to assess the damages. I am of opinion, however, that this belongs to a class of cases over which courts of law and courts of equity have a common jurisdiction, and in which the procedure of both jurisdictions is adapted for doing justice. I do not regret that there is such a class of cases, nor should I be sorry to see it extended. But being of opinion that this is a case in which a court of equity has jurisdiction as well as a court of law, I think that it is a much better case for a court of equity than for a court of law, because a court of law could only have left it to a jury to assess the damages; whereas here, by the superior powers of the court of equity, justice can be done between the parties in the most minute detail." Knight-Bruce, L. J., said (p. 527): "On the merits of this case there can be no possibility of question. The only point reasonably arguable was, in which of the courts redress should be sought, and it has been said that redress should be sought in a court of law. It is true that, according to modern practice, a court of law would afford redress in the case by means of an action, with the assistance of a jury; but the courts of law in this country exercise jurisdiction in these cases by means of a gradual extension of their powers, and we know that that does not deprive the courts of equity of their ancient and undoubted jurisdiction which they exercised before courts of law enlarged their limits. The observation is familiar—and some of us have heard it used by Lord Eldon—that the jurisdiction not only belongs to this court, but belonged to it originally. * * * I do not mean to say that in all cases the court will exercise the jurisdiction. It is in the power of the court to say that it will not do so in particular cases, but I am perfectly satisfied that this is a case in which the jurisdiction ought to be exercised." These observations are very weighty, and correctly state the relative position of the two jurisdictions in equity and at law over matters of fraud. Some of the American decisions *seem* to speak as though the jurisdiction at law in cases of fraud had existed from the beginning, full and complete; while that in equity was a subsequent creation, including only those matters which, it was found, could not be easily determined at law. Turner, L. J., said (p. 528): "If we were to grant any relief upon this appeal, we should be very much narrowing an old jurisdiction of this court, by confining it to cases in which the jurisdiction has been exercised. We should, I think, be taking *the cases as the measure of the jurisdiction instead of as the examples of that jurisdiction.*" These words contain the very essence of the true theory concerning the function of decided cases to operate as *examples* of all legal principles and doctrines, rather than as being their *sources* or fountains. They deserve to be emblazoned on the walls of every court-room in the country, so that they might be under the constant observation of all judges

there was no form of action appropriate for the recovery of damages on account of fraud. The jurisdiction of the law courts in such cases was of later origin, and was of gradual growth. It was not until the invention of the actions of assumpsit, case, and trover, in which equitable principles could be largely admitted, that the jurisdiction at law in matters of fraud became fully developed. The full jurisdiction of equity having thus been established from the earliest time, it should not, in accordance with familiar principles, be at all affected by a subsequent growth of a similar common law jurisdiction. To say that the full jurisdiction of equity has been any way abridged, impaired, or altered, because the law courts have gradually assumed and finally acquired a like jurisdiction, even though competent in many cases to administer adequate relief, is to violate one of the most fundamental principles regulating the general equitable jurisdiction. The sum of the English doctrine, therefore, is that, although the jurisdiction always *exists*, whether it will be exercised depends upon the circumstances of individual cases.[1]

who are applying precedents in the work of constructing and developing the law. See, also, Colt v. Woollaston, 2 P. Wms. 154; Evans v. Bicknell, 6 Ves. 174; Burrowes v. Lock, 10 Id. 470; Green v. Barrett, 1 Sim. 45; Blair v. Bromley, 5 Hare, 542, 556; 2 Phil. 354, 361; Ingram v. Thorp, 7 Hare, 67; Cridland v. Lord De Mauley, 1 De G. & Sm. 459; Atkinson v. Mackreth, L. R., 2 Eq. 570.

[1] I add several cases, most of them recent, merely as examples of the exercise of the jurisdiction when some remedy might also have been obtained at law. The discussion of the peculiarly equitable remedies, such as cancellation, specific enforcement, reformation, injunction, etc., is postponed. *Pecuniary recoveries; jurisdiction not exercised.*—Newham v. May, 13 Price, 749, 751 (suit on a fraudulent warranty); Leather v. Simpson, L. R., 11 Eq. 398 (to recover back money paid for a forged bill); Ship v. Crosskill, Id., 10 Id. 73 (to recover back money paid for shares); Ochsenbein v. Papelier, Id., 8 Ch. 695 (court refused to enjoin an action at law on an insurance policy, on the ground that the question of fraud involved could be better tried at law). *Pecuniary recoveries; jurisdiction exercised.*—See cases in the last note, and also, Wilson v. Short, 6 Hare, 366 (suit by a principal against his agent); Barker v. Birch, 1 De G. & Sm. 376; Coomer v. Bromley, 5 Id. 532; McIntosh v. Great West. Ry., 2 Macn. & G. 74 (discovery and relief on a contract, although there was a remedy at law). *Cancellation or rescission of contracts, sales, etc.*—Jennings v. Broughton, 5 De G. M. & G. 126 (cancellation of a contract of purchase); Reynell v. Sprye, 1 Id. 660 (setting aside an agreement); Rawlins v. Wickham, 3 De G. & J. 304 (setting aside a contract of partnership and indemnifying plaintiff against the debts of the firm); Bartlett v. Salmon, 6 De G. M. & G. 33 (setting aside a contract); Walsham v. Stainton, 1 De G. J. & S. 678 (setting aside a sale and recovering the value); Traill v. Baring, 4 Id. 318 (canceling a policy of insurance, notwithstanding the remedy at law); Skilbeck v. Hilton, L. R., 2 Eq. 587 (setting aside a release); Hoare v. Bremridge, Id., 14 Id. 522; 8 Ch. 22 (cancellation of an insurance policy; the jurisdiction certain although the remedy at law might be better); London etc. Co. v. Seymour, L. R., 17 Eq. 85 (ditto); Flower v. Lloyd, Id., 10 Ch. D. 327 (setting aside a judgment); Lemprière v. Lange, Id., 12 Id. 675 (setting aside a fraudulent lease against an infant lessee guilty of the fraud). *Recovering real estate to which the plaintiff was entitled, and which he*

§ 913. **Exception: Fraudulent Wills.**—The marked exception to the jurisdiction referred to in the foregoing paragraph, is that of canceling wills obtained by means of fraud. In a few very early decisions, the court of chancery seems to have asserted such a jurisdiction. For more than a century, however, and through a long series of cases, the judges have either refused to exercise the jurisdiction, or denied its existence; and it has finally been settled by the tribunal of last resort, that under their general jurisdiction, courts of equity have no power to entertain suits for the purpose of setting aside or canceling a will on the ground that it was procured by fraud. The same rule has been generally adopted in the United States. Under the common system the validity of wills of real estate could only be tested in an action at law; that of wills of personal estate was established by the decree of the ecclesiastical court in the proceedings for probate. Under the statutory system generally prevailing in this country, both wills of real estate and wills of personal estate are admitted to probate; in some of the states the decree of the probate court is conclusive with respect to both kinds; in other states it is conclusive only with respect to those of personal property.[1]

had been prevented by fraud from possessing and enjoying.—Vane v. Vane, L. R., 8 Ch. 383 (lapse of time no bar where the fraud was concealed from the plaintiff—a remarkable case); Chetham v. Hoare, Id., 9 Eq. 571 (lapse of time no bar where the fraud has been concealed); Howard v. Earl of Shrewsbury, Id., 2 Ch. 760. *Specific enforcement of false representations; compelling the defendant to make them good.*—Hutton v. Rossiter, 7 De G. M. & G. 9, 18, 19 (against an executor who had represented that the assets of the estate were sufficient, and that a certain claim would be paid). *Enforcing a constructive trust against a party who has fraudulently obtained the title to land.*—Rolfe v. Gregory, 4 De G. J. & S. 576 (delay excused by concealed fraud). See, also, on the subject of jurisdiction in general, Garth v. Cotton, 3 Atk. 751; Man v. Ward, 2 Id. 228; Trenchard v. Wanley, 2 P. Wms. 167; Huguenin v. Baseley, 14 Ves. 273; Browne v. Savage, 4 Drew. 635; Stent v. Bailis, 2 P. Wms. 220; Chesterfield v. Janssen, 2 Ves. Sen. 125; Barker v. Ray, 2 Russ. 63; Taff Vale etc. Ry. v. Nixon, 1 H. L. Cas. 109, 221.

[1] The early cases which admit the jurisdiction are Herbert v. Lowns, 1 Chan. Rep. 12; Maundy v. Maundy, 1 Id. 66; Welby v. Thornagh, Prec. Ch. 123; Goss v. Tracey, 1 P. Wms. 287; Lucas v. Burgess, Reg. Lib. 1573, A, fol. 7; Corp'n of Feversham v. Parr, Reg. Lib. 1573, A, fol. 208; and see Munro *Acta Cancellariæ*, p. 398. The following cases, directly or impliedly, deny the jurisdiction: Allen v. McPherson, 1 H. L. Cas. 191; 1 Phil. 133; 5 Beav. 469; Jones v. Gregory, 2 De G. J. & S. 83; Wright v. Wilkin, 4 De G. & J. 141; Andrews v. Powys, 2 Bro. P. C. 504; Kerrick v. Bransby, 7 Bro. P. C. 437; Bennet v. Vade, 2 Atk. 324; Webb v. Claverden, Id. 424; Jones v. Jones, 3 Meriv. 161; Armitage v. Wadsworth, 1 Madd. 189; Roberts v. Wynn, 1 Chan. Rep. 125. Archer v. Mosse, 2 Vern. 8; Thynn v. Thynn, 1 Id. 286; Nelson v. Oldfield, 2 Id. 76; Plume v. Beale, 1 P. Wms. 388; Barnesly v. Powel, 1 Ves. Sen. 284, 287; Sheffield v. Duchess of Buckingham, 1 Atk. 628; *Ex parte* Fearon, 5 Ves. 633, 647; Price v. Dewhurst, 4 My. & Cr. 76, 80; Gingell v. Horne, 9 Sim. 539, 548; *In re* Broderick's Will, 21 Wall. 503; Jones v. Bolles, 9 Id. 364; Gaines v. Chew, 2

§ 914. **The American Doctrine.**—In a few of the earlier decisions the English rule was adopted to its full extent.[1] This can not, however, be regarded as the present American doctrine. As was shown in the former volume, in several of the states only a partial and very narrow equitable jurisdiction was for a long time conferred, and this was strictly limited by the courts to the very matters specified by the statutes. In other states, the equitable jurisdiction was defined by statute as embracing only those cases for which there was no adequate remedy at law. Influenced partly by the tendency of this legislation, and partly by the supposed constitutional guaranties of the jury trial, which were construed to forbid the interposition of equity in controversies which *could* be determined at law, the equity courts of the United States and of the several states have practically abandoned a large part of the jurisdiction in matters of fraud which is confessedly held by the English court of chancery. The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain, and complete.[2] The language on this subject often

How. (U. S.) 619, 645; Tarver v. Tarver, 9 Pet. 174; Gould v. Gould, 3 Story, 516, 537; Adams v. Adams, 22 Vt. 50; Waters v. Stickney, 12 Allen, 1; Colton v. Ross, 2 Paige, 396; Trexler v. Miller, 6 Ired. Eq. 248; Blue v. Patterson, 1 Dev. & Bat. Eq. 457; McDowall v. Peyton, 2 Desaus. 313; Watson v. Bothwell, 11 Ala 650; Hamberlin v. Terry, 7 How. (Miss.) 143; Cowden v. Cowden, 2 Id. 806; Ewell v. Tidwell, 20 Ark. 136; Archer v. Meadows, 33 Wisc. 166; California v. McGlynn, 20 Cal. 233, 266; Booth v. Kitchen, 7 Hun, 255; Van Alst v. Hunter, 5 Johns. Ch. 148; Muir v. Trustees, 3 Barb. Ch. 477; Hunter's Will, 6 Ohio, 499; Hunt v. Hamilton, 9 Dana, 90; Burrow v. Ragland, 6 Humph. 481. While it plainly appears from these cases that there is no jurisdiction to set aside a probate on the ground of fraud in obtaining the will, there would not seem to be any such objection on principle to the granting of appropriate relief against the probate itself on account of fraud in the proceedings independently of the will. Such relief would seem to be exactly analogous to that granted against any fraudulent decree or judgment. With respect to jurisdiction of a court of probate, see the two following remarkable cases: Roderigas v. East Riv. Sav. Inst., 63 N. Y. 460; Roderigas v. East. R. S. Inst., 76 Id. 316. As to jurisdiction in case of a lost or destroyed will, see Gaines v. Chew, 2 How. (U. S.) 619, 645; Bailey v. Stiles, 1 Green Ch. 220; Allison v. Allison, 7 Dana, 90; Buchanan v. Matlock, 8 Humph. 390; Morningstar v. Selby, 15 Ohio, 345; Slade v. Street, 27 Ga. 17.

[1] For example, by Chan. Kent in Bacon v. Bronson, 7 Johns. Ch. 201.

[2] I have already discussed this general doctrine in the former volume. See with respect to the jurisdiction of the U. S. courts, *ante*, §§ 295, 296, 297, and cases cited; with respect to the jurisdiction in New Hampshire, § 303; in Massachusetts, §§ 313, 318; in Maine, §§ 323, 327. See also Earl of Oxford's Case, 2 Eq. Lead. Cas. 1550-1553; note by American editor. The following are a few of the vast number of cases in which the juris-

used by judges, represents nearly the entire jurisdiction of equity in matters of fraud, whatever be the remedies granted, as concurrent with that at the law, and as not *existing* where adequate legal relief can be given. The inaccuracy of this mode of expression has been shown in the former volume. The true doctrine is, that where the estate or interest is equitable the

diction in matter of fraud is discussed, and its limitations and exceptions are stated: Grand Chute v. Winegar, 15 Wall. 373; Insurance Co. v. Bailey, 13 Id. 616; Jones v. Bolles, 9 Id. 364; Bank of Bellows Falls v. Rutland etc. R. R., 28 Vt. 470; Crane v. Bunnell, 10 Paige, 333; Russell v. Clark's Ex'rs, 7 Cranch, 69, 89; Hardwick v. Forbes' Adm'r, 1 Bibb, 212; Waters v. Mattingly, 1 Id. 244; Blackwell v. Oldham, 4 Dana, 195; Warner v. Daniels, 1 Wood. & M. 90, 112; Ferson v. Sanger, Davies, 252, 259; Bassett v. Brown, 100 Mass. 355; Suter v. Matthews, 115 Id. 253; Hubbell v. Currier, 10 Allen, 333; Miller v. Scammon, 52 N. H. 609; Woodman v. Freeman, 25 Me. 531; Piscataqua Ins. Co. v. Hill, 60 Id. 178, 183; Clark v. Robinson, 58 Id. 133, 137; Williams v. Mitchell, 30 Ala. 299; Learned v. Holmes, 49 Miss. 290; Boardman v. Jackson, 119 Mass. 161. In the two following recent cases the doctrine was clearly stated in both of its aspects: Girard Ins. Co. v. Guerard, 3 Woods C. C. 427. Held, that a suit in equity to recover on a bond which had been delivered up and canceled through the fraud of a person not a party to the suit, but which was still in force, will not be sustained where no discovery is sought, and where a substantial copy is furnished. Woods, J., said (p. 431): "It is not *mere* fraud which confers jurisdiction on a court of equity. A party may be guilty of a fraud in the warranty of personal property sold, but nevertheless the remedy is at law on the warranty. So, if the maker of a bond, by fraudulent artifice, or even theft, gets possession of the bond from the obligee, still if the obligee has a duplicate of the bond he can not proceed in equity to recover upon the bond. A court of equity has jurisdiction to relieve from the consequences of fraud, as when a bond or note is procured, or deed of conveyance obtained, on false and fraudulent pretenses. So when a bond or deed is delivered up on fraudulent representations and is canceled or destroyed." (I would remark that, if this reasoning is correct, it seems to strike at the root of the jurisdiction to entertain suits on lost instruments of indebtedness.) Wampler v. Wampler, 30 Gratt. 454. Held, that a deed of conveyance obtained by fraud may be set aside. Christian, J., said (p. 459): "Courts of equity have an original, independent, and inherent jurisdiction to relieve against every species of fraud. Every transfer or conveyance of property, by what means soever it may be done, is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments, or decrees may be the instruments to which parties resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted by a court of equity to obstruct the requirements of justice. If a case of fraud be established, a court of equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. These principles have now become axioms of equity jurisprudence." I am convinced that the practical surrender by the equity courts of this country of so large a portion of their original and most certain jurisdiction, was both unfortunate and unnecessary. There are multitudes of cases, even for the recovery of money alone, in which justice could be administered and the rights of both litigants protected far better by a trained judge, than by leaving everything to the rough and ready justice of an ordinary jury. The English courts have perceived and admitted this truth. Doubtless the influence of able courts, like those of Massachusetts, Maine, and Pennsylvania, has been very powerful in shaping the decisions of other state tribunals, the narrow and purely statutory jurisdiction of the former states not, perhaps, having been sufficiently observed.

jurisdiction exists and will always be exercised; where the estate, interest, or right is legal, and the remedies are equitable, the jurisdiction always exists, but will not always be exercised; where the right is legal, and the remedy is pecuniary and legal, the jurisdiction is concurrent and only exists where the remedy at law is inadequate. I have placed in the foot-note a number of recent decisions, arranged in groups according to the nature of their reliefs, merely as examples and illustrations of the doctrine adopted by the American courts.[1] The question whether

[1] *Cancellation of conveyances, contracts, and other private instruments. The jurisdiction exercised.*—Derrick v. Lamar Ins. Co., 74 Ill. 404 (an assignment of a policy fraudulently procured from the assured by an officer of the insurance company, set aside); Remington etc. Co. v. O'Dougherty, 81 N. Y. 474 (a forged deed); Hammond v. Pennock, 61 Id. 145; Fisher v. Hersey, 78 Id. 387 (a sale of land in pursuance of a decree, but fraudulently made; sale set aside, and a resale ordered); Hackley v. Draper, 60 Id. 88 (sale of a debt in pursuance of an order of court obtained by fraud); Bruce v. Kelly, 5 Hun, 229, 232 (conveyance); Vandercook v. Cohoes Sav. Inst., Id. 641 (fraudulent sale under a decree of foreclosure); Smith v. Griswold, 6 Oreg. 440 (a court of equity will cancel a bill of sale of personal property executed through fraud); Globe Life Ins. Co. v. Reals, 50 How. Pr. 237 (a life policy); Glastenbury v. McDonald, 44 Vt. 450 (a contract); Willemin v. Dunn, 93 Ill. 511 (voluntary conveyance on account of mental weakness and undue influence); Fuller v. Percival, 126 Mass. 381 (cancellation of a firm note fraudulently given by a partner of the plaintiff to a holder with notice of the fraud); Emigrant Co. v. County of Wright, 7 Otto, 339 (contract for conveyance of land procured in fraud of public rights and for grossly inadequate consideration); Wampler v. Wampler, 30 Gratt. 454 (conveyance of land); Hosleton v. Dickinson, 51 Iowa, 244 (equitable defense; in an action on a promissory note given for the price of land, defendant may have the note canceled to the extent of the damage sustained by him from false representations in the sale); Field v. Herrick, 5 Ill. App. 54 (a lease obtained by fraud upon the lessee); Tracy v. Colby, 55 Cal. 67 (sale of land made in pursuance of a judicial order); Moore v. Moore, 56 Cal. 89 (conveyance procured by undue influence); U. S. Ins. Co. v. Central Nat. Bk., 7 Ill. App. 426 (bill supplementary to execution, setting aside conveyance fraudulent against a creditor); Noble v. Hines, 72 Ind. 12; Bruker v. Kelsey, 72 Id. 51; and Pfeifer v. Snyder, 72 Id. 78 (to set aside a conveyance of land fraudulent against the plaintiff as a judgment creditor, the complaint must aver that there is not other sufficient property subject to execution to satisfy the demand); Thompson v. Heywood, 129 Mass. 401 (where land was fraudulently sold and conveyed to the owner of the equity of redemption under a power of sale contained in a prior mortgage, a subsequent mortgagee is entitled to have such sale and conveyance canceled); and see Huxley v. King, 40 Mich. 73 (setting aside title fraudulently acquired under a foreclosure and redemption); Somerville v. Donaldson, 26 Minn. 75 (conveyance of land); Poston v. Balch, 69 Mo. 115 (a sale of personal property set aside at suit of the defrauded vendor, and real estate into which the property had been converted by the fraudulent vendee subjected to a lien for its value); Free v. Buckingham, 57 N. H. 95 (fraudulent conveyance of land); Ladd v. Rice, 57 Id. 374 (fraudulent conveyance set aside and reconveyance ordered); Willis v. Sweet, 49 Wisc. 505 (a deed of land delivered as an escrow and fraudulently recorded, set aside). *The same. Jurisdiction, when not exercised.* The rule is generally adopted that a suit will not be sustained to cancel an executory, non-negotiable, personal contract—*e. g.*, a policy of insurance—when the fraud might be set up as a defense to an action on the contract, and there are no special circumstances which would prevent the defense from being available, adequate, and complete. Globe etc. Ins. Co. v. Reals, 79 N. Y. 202 (where the jurisdiction of

equity has jurisdiction of suits merely for the recovery of money, or whether the action should be at law, has, however, ceased to be of any practical importance in those states which have adopted the reformed procedure. The codes provide that

equity will not be exercised to cancel a policy of insurance or other written executory contract; it is not sufficient that a defense exists and the evidence might be lost; there must be circumstances showing injury which a court of equity alone can prevent); Huff v. Ripley, 58 Ga. 11 (will not set aside fraudulent sale of personal property when remedy at law is adequate); Ins. Co. v. Bailey, 13 Wall. 616, 621, 623 (policy of insurance will not be canceled when the facts constitute a complete defense at law); Rawson v. Harger, 48 Iowa, 269 (contract for sale of an invention, if neither party knew of its want of novelty, and both had the same means of information and acted in good faith, the contract will not be canceled); Moore v. Holt, 3 Tenn. Ch. 248 (a contract for the purchase of real property will not be canceled at the suit of one contractor on account of the fraud of his co-contractor, when the other parties were innocent of the wrong); Tuttle v. Tuttle, 41 Mich. 211 (a mortgage on land, conveyed on consideration of supporting the grantor, will not be canceled as fraudulent against such grantor, when he again becomes owner of the land); Johnson v. Murphy, 60 Ala. 288 (the breach of an agreement to make future advances if a mortgage is executed for past advances, is not sufficient to have the mortgage canceled on the ground of fraud; the remedy is at law); Noel v. Horton, 50 Iowa, 687 (deed of land will not be canceled on the ground of false representations concerning mere collateral matters not affecting the substance of the contract); Dunaway v. Robertson, 95 Ill. 419 (a person who executes deeds with intent to defraud creditors and puts them on record, but does not deliver them, can have no relief against them in equity); Compton v. Bunker Hill Bk., 96 Id. 301 (a deed will not be canceled when made through the fraud of a third person not authorized to act for the grantee, the fraud being unknown to the latter when the deed was received); Briggs v. Johnson, 71 Me. 235 (a deed invalid on its face will not be canceled as a cloud on title); Lavassar v. Washburne, 50 Wisc. 200 (a deed of land will not be canceled unless the proof of fraud is clear and convincing).

Cancellation of judgments and other judicial proceedings, and suits to restrain actions and judgments at law. The jurisdiction exercised.—Dederer v. Voorhies, 81 N. Y. 153 (to set aside fraudulent proceedings of commissioners in making an assessment for a road); Hunt v. Hunt, 72 Id. 217 (what necessary in order to set aside a judgment for fraud); Jordan v. Volkenning, Id. 300 (ditto); Ross v. Wood, 70 Id. 8 (ditto); Harbaugh v. Hohn, 52 Ind. 243 (judgment fraudulently taken for a larger sum than was due); Harris v. Cornell, 80 Ill. 54 (a fraudulent decree for the sale of land); Doughty v. Doughty, 27 N. J. Eq. (12 C. E. Green), 315 (a judgment recovered in another state); Craft v. Thompson, 51 N. H. 536 (an award obtained by fraud); Holland v. Trotter, 22 Gratt. 136 (where party was prevented by fraud from setting up a good defense in the action at law); Babcock v. McCamant, 53 Ill. 214 (collection of a fraudulent judgment restrained; equity jurisdiction in fraud not lost because a statute has given a similar jurisdiction at law); Graham v. Roberts, 1 Head, 56, 59 (a judgment by default fraudulently obtained without service of process); Sayles v. Mann, 4 Ill. App. 516 (a judgment fraudulently obtained against a married woman); District etc. of Algona v. District etc. of Lott's Creek, 54 Iowa, 286 (a fraudulent award); Huxley v. King, 40 Mich. 73 (a fraudulent foreclosure and redemption thereunder.)

The same. Jurisdiction, when not exercised.—U. S. v. Throckmorton, 8 Otto, 61 (a judgment or decree—*e. g.*, confirming a claim under a Mexican grant—will not be set aside by an equity suit brought for that purpose, on the ground that it was obtained by fraudulent and forged documents and fraudulent and perjured testimony, when the self-same questions and the issues thereon were presented, considered, and determined by the court in the judgment itself which is assailed); Kelly v. Christal, 81 N. Y. 619 (equity will not set aside, or re-

all actions, simply for the recovery of money, without making any exceptions, must be tried by a jury, and the same general rules of pleading are prescribed for all kinds of suits. It follows, therefore, that there would be no real distinction in the form,

strain, or relieve against a judgment at law on the ground of fraud, when all the facts could have been set up and would have been a complete defense to the action at law. The following cases also are to the same effect): Cairo etc. R. R. v. Titus, 27 N. J. Eq. 102; Barker v. Rukeyser, 39 Wisc. 590; Thomason v. Fannin, 54 Ga. 361; Grubb v. Kolb, 55 Id. 630; Cairo etc. R. R. v. Holbrook, 92 Ill. 297; and Stilwell v. Carpenter, 2 Abb. N. C. 238; Shepard v. Akers, 3 Tenn. Ch. 215 (equity will not relieve against a judgment at law on the ground merely of irregularities at the trial, laches of the party himself, or negligence or even fraud of the party's own counsel); Robinson v. Wheeler, 51 N. H. 384 (equity will not relieve against a judgment at law merely on the ground of a defense insufficient at law where no discovery is sought).

Pecuniary recoveries. Concurrent jurisdiction, when exercised.—Getty v. Devlin, 70 N. Y. 504 (against fraudulent promotors of a fraudulent corporation; accounting and recovery of money invested in the stock of the company); Erie R. R. v. Vanderbilt, 5 Hun, 123 (suit by corporation against trustees for a fraudulent disposition of corporate property); Marlow v. Marlow, 77 Ill. 633 (payment decreed of promissory notes fraudulently obtained by the maker from the holder); Scott v. Scott, 33 Ga. 102, 104, and Harper v. Whitehead, 33 Id. 138 (general rule, inadequate remedy at law is a sufficient ground for a suit in equity); Ellis v. Kelly, 8 Bush, 621, 631 (money compelled to be paid by a fraudulent judgment, recovered back after a discovery of the fraud).

The same. Concurrent jurisdiction for recovery of money, when not exercised.—Stephens v. B'd of Education, 79 N. Y. 183 (where trust moneys have been fraudulently disposed of but have been paid to a *bona fide* holder); Bay City Bridge Co. v. Van Etten, 36 Mich. 210 (against officers of a corporation, who have ceased to be such, for money fraudulently appropriated to their own use, when no discovery is sought); Youngblood v. Youngblood, 54 Ala. 486 (money overpaid through fraudulent representations); Huff v. Ripley, 58 Ga. 11 (fraudulent sale of personal property where the remedy at law is complete); Frue v. Loring, 120 Mass. 507 (money overpaid by fraud, or fraudulent conversion of chattels); Ferson v. Sanger, Davies, 252, 259, 261 (to recover damages arising from fraud); Woodman v. Saltonstall, 7 Cush. 181 (where there is an adequate remedy at law in insolvency proceedings, equity will not interfere in Massachusetts even though a discovery is sought); Bassett v. Brown, 100 Mass. 355 (no equity jurisdiction in Massachusetts of a suit for repayment of money or reconveyance of land on the ground of fraud; the remedy is at law); Suter v. Matthews, 115 Id. 253 (fraud not sufficient to give equity jurisdiction in Massachusetts when the law provides an adequate remedy); Girard Ins. Co. v. Guerard, 3 Wood's C. C. 427 (suit on a bond which had been delivered up and canceled through fraud of a third person); Jewett v. Bowman, 29 N. J. Eq. 174 (a bill alleging fraud can not be turned into an action for an accounting, on failure to prove the fraud).

Jurisdiction in matters relating to or connected with administrations.—Fulton v. Whitney, 5 Hun, 16 (the final accounting by executors or trustees before a surrogate, is no bar to a suit in equity to enforce a trust); Richardson v. Brooks, 52 Miss. 118 (there is no jurisdiction in equity to correct probate proceedings; but the jurisdiction of equity over the acts of trustees will not be affected by the proceedings in a court of probate); Freeman v. Reagan, 26 Ark. 373, 378 (equity has jurisdiction over an administration when there has been fraud or waste); Kellogg v. Aldrich, 30 Mich. 576 (no jurisdiction in equity of a suit for the distribution of an intestate's personal estate on the ground of fraud; proceedings must be in a probate court); Cota v. Jones, 8 Pac. Law J. 1044, Sup. Ct. of Cal. (A. and B. were two of the heirs and next of kin of a deceased intestate whose estate was in the course of administration, and each was entitled to an undivided share of such estate.

pleadings, procedure, mode of trial, judgment, and execution, in those states, whether the action is regarded as equitable or legal.

§ 915. **Incidents of the Jurisdiction and Relief.**—There are certain incidents which are requisite to the exercise of the jurisdiction, and to the granting of any relief, and which result partly from the equitable conception of fraud itself in its effects upon the rights and liabilities of the two parties, and partly from the theory concerning remedies and their administration. These incidental requisites are referable, therefore, to the two following general principles: First, fraud does not render contracts and other transactions absolutely void, but merely voidable, so that they may be either confirmed or repudiated by the

By false and fraudulent representations that the estate was virtually insolvent, and that A.'s share was valueless, the defendant B. procured the plaintiff A. to give the defendant an absolute conveyance and assignment of all A.'s share in the estate for a nominal consideration. When the estate was subsequently settled and distributed, B., as the assignee of A., received A.'s share by the decree of distribution, which share consisted of lands and personal property, and was from $8,000 to $10,000 in value. A. did not discover the fraud until several years after, and upon such discovery immediately brought this suit. *Held*, that the court had jurisdiction in equity to give A. complete relief by declaring B. to be a trustee of the property thus fraudulently acquired, and by compelling a conveyance to A.; that the decree of distribution did not affect A.'s rights or prevent the relief; and that the fraud not having been discovered, the action was not barred by the statute of limitations or by the lapse of time).

Jurisdiction exercised by impressing a trust on property acquired by fraud. Cota v. Jones, *supra;* Bennett v. Austin, 81 N. Y. 308 (fiduciary person buying in property and held to be a trustee); Stephens v. B'd of Education, 79 Id. 183 (trust moneys fraudulently transferred can not be reached in the hands of a *bona fide* holder); People v. Houghtaling, 7 Cal. 348, 351 (a fraudulent grantee held to be a trustee); Watson v. Erb, 33 Ohio St. 35 (the breach of a verbal agreement to buy land and convey it to the plaintiff is not a fraud which authorizes a court of equity to declare a trust and compel a conveyance); McVey v. McQuality, 97 Ill. 93 (a fraudulent grantee treated as a trustee for the equitable owner).

Miscellaneous cases of fraud.—Durant v. Davis, 10 Heisk. 522 (borrowing money to pay for land purchased with the promise to give the lender a mortgage on the land, which promise is violated, is not a fraud giving rise to a trust, nor does the lender become subrogated to the vendor's lien on the land); Struve v. Childs, 63 Ala. 473 (an injunction granted to restrain the sale of land under a power in a mortgage, when the mortgagee colludes with third persons to obtain a wrongful lien on the land under the sale); Leupold v. Krause, 95 Ill. 440 (homestead; neither fraud nor even the commission of a crime will work a forfeiture of homestead rights); Dickenson v. Seaver, 44 Mich. 624 (a right to complain of fraud and to sue for relief is not assignable); Grubb's Appeal, 90 Pa. St. 228 (the proper construction of a deed is not a ground for equity jurisdiction—that is, a suit for the construction of a deed can not be maintained; a deed will not be reformed when there is no allegation of fraud, mistake, or accident); Williamson v. Carskadden, 36 Ohio St. 664 (in an action on a mortgage regular in form, it may be shown in defense that the delivery, as to several of the persons who signed it, was unauthorized and fraudulent). The foregoing examples which are purposely selected from the most recent decisions, will be sufficient, it is hoped, to put the reader on the track of the authorities which deal with the subject of equitable jurisdiction over matters of fraud.

party who had suffered the wrong.[1] Secondly, if he elects to repudiate, and to seek for a remedy, then equity proceeds upon the theory that the fraudulent transaction is a nullity; and it administers relief by putting the parties back into their original position, as though the transaction had not taken place, and by doing equity to the defendant as well as to the plaintiff. The consequences of these two principles, which have been alluded to, and which remain to be considered, are as follows.

§ 916. **The Same; Plaintiff Particeps Doli; Ratification.** If the plaintiff is himself a party to the fraud, *particeps doli*, to such an extent that he is *in pari delicto* with the defendant, he can obtain no relief; equity does not in general relieve a person from the consequences of his own actual fraud.[2] The mere fact, however, that the plaintiff was a party to the wrong in any degree, and is not therefore completely innocent, will not necessarily deprive him of relief, defensive, or even affirmative. If he is not *in pari delicto*, and is comparatively the more innocent of the two, he may obtain relief by doing full equity to those parties, if any, who have sustained injury by his partial wrong.[3] While the party entitled to relief may either avoid the transaction or confirm it, he can not do both; if he adopts a part he adopts all; he must reject it entirely if he desires to obtain relief.[4] Any material act done by him, with

[1] Oakes v. Turquand, L. R., 2 H. L. 325, 346; Lindsley v. Ferguson, 49 N. Y. 623, 625; Negley v. Lindsay, 67 Pa. St. 217, 228; Pearsoll v. Chapin, 8 Wright, 9; Wood v. Goff, 7 Bush, 59, 63. Some of the cases draw an important distinction between fraudulent instruments which a party intends to execute in the form and character which they purport to have—that is, he intends to execute a deed as a deed, an assignment as an assignment—but this his intention is procured by fraud; and those instruments which he does not intend to execute in the form and character which they purport to have, but he executes them under the fraudulent representation, and conviction produced thereby, that their character is different from what it really is; for example, a person executes a deed, under the fraudulent representation and conviction that he is executing a receipt; he intends to execute a receipt, but really executes a deed. In the latter class of cases, the instrument is so far *void*, it is said, that even a *bona fide* purchaser can acquire no rights under it; and the remedial rights of the defrauded party are not prejudiced by his delay in enforcing them. Tayler v. Great Indian etc. Ry., 4 De G. & J. 559, 573, 574; Donaldson v. Gillot, L. R., 3 Eq. 274; Ogilvie v. Jeaffreson, 2 Giff. 353; Livingston v. Hubbs, 2 Johns. Ch. 512; County of Schuylkill v. Copley, 67 Pa. St. 386; McHugh v. County of Schuylkill, 67 Id. 391, 396. See also a series of cases on fraudulent promissory notes involving this distinction.

[2] See *ante*, vol. 1, § 401, and cases cited; Dunaway v. Robertson, 95 Ill. 419; Roman v. Mali, 42 Md. 513.

[3] See *ante*, vol. 1, § 403, and cases cited; Solinger v. Earle, 82 N. Y. 393; Erie R. R. v. Vanderbilt, 5 Hun, 123; Poston v. Balch, 69 Mo. 115. A person who comes within this rule must restore those who have sustained injury by him, as a condition to his obtaining any relief. See Kisterbock's Appeal, 51 Pa. St. 483; and see Briggs v. Rice, 130 Mass. 50.

[4] Great Luxembourg R'y v. Magnay, 25 Beav. 586, 594; Potter v. Titcomb, 22 Me. 300; Farmers' B'k v. Groves,

knowledge of the facts constituting the fraud, or under such circumstances that knowledge must be imputed, which assumes that the transaction is valid, will be a ratification.[1]

§ 917. **Promptness; Delay through Ignorance of the Fraud.**—The most important practical consequence of the two principles above mentioned, is the requisite of promptness. The injured party must assert his remedial rights with diligence and without delay, upon becoming aware of the fraud. After he has obtained knowledge of the fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiescence, and this may be, and generally will be, a bar to any equitable remedy.[2] To this rule there is one limitation; it applies only when the fraud is known or ought to have been known. No lapse of time, no delay in bringing a suit, however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud; The duty to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time.[3]

12 How. (U. S.) 51. To entitle a party to rescind an agreement for the exchange of land for goods, he must be able to put the other party in as good a condition as before the exchange, Smith v. Brittenham, 98 Ill. 188.

[1] See *ante*, § 897. In the same suit a party can not claim under and against the fraudulent transaction. If his suit is brought to enforce rights arising from the transaction as standing, he can not ask to have it rescinded, and the like. See Coleman v. Columbia Oil Co., 51 Pa. St. 74, 77. If, however, the injured party has obtained the relief in an equity suit that a fraudulent conveyance be canceled and the property reconveyed, this is not, it seems, any bar to an action at law for damages, Bruce v. Kelly, 5 Hun, 229, 232.

[2] See *ante*, §§ 817, 819, 820; Briggs v. Rice, 130 Mass. 50; Hathaway v. Noble, 55 N. H. 508; Lyme v. Allen, 51 Id. 242; Willoughby v. Moulton, 47 Id. 205, 208; Weeks v. Robie, 42 Id. 316; Badger v. Badger, 2 Wall. 87, 94; Allore v. Jewell, 4 Otto, 506, 512; Sullivan v. Portland R. R., 4 Id. 806, 811; Maxwell v. Kennedy, 8 How. (U. S.) 210; Campau v. Van Dyke, 15 Mich. 371; Wilbur v. Flood, 16 Id. 40; Weaver v. Carpenter, 42 Iowa, 343; Akerly v. Vilas, 21 Wisc. 88; Jones v. Smith, 33 Miss. 215; Shaver v. Radley, 4 Johns. Ch. 310; Philips v. Belden, 2 Edw. Ch. 1; Ward v. Van Bokkelen, 1 Paige, 100; Bank of U. S. v. Biddle, 2 Pars. Eq. 31; McDowell v. Goldsmith, 2 Md. Ch. 370; Anderson v. Burwell, 6 Gratt. 405; Field v. Wilson, 6 B. Mon. 479. Courts of equity have also been in the habit of applying the statute of limitations as a bar, by analogy, in all ordinary cases, even though equitable suits were not expressly included within the statutory provisions. See Kane v. Bloodgood, 7 Johns. Ch. 90; Lansing v. Starr, 2 Id. 150.

[3] Modern statutes of limitation usually provide that the statutory period shall begin to run only from the discovery of the fraud by the injured party; but even in the absence of such an express provision the courts have put this construction upon the statute. Vane v. Vane, L. R., 8 Ch. 383, 398; Rolfe v. Gregory, 4 De G. J. & S. 576, 579; Chetham v. Hoare, L. R., 9 Eq. 571; Allfrey v. Allfrey,

§ 918. **Persons against whom Relief is Granted.**—The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. "A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language, from his children and his children's children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud."[1] There is one limitation. If the property which was acquired by the fraud has come by transfer into the hands of a *bona fide* purchaser for a valuable consideration and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed, and the remedy of the defrauded party, with respect to the property itself, is gone; his only relief must be personal against those who committed the fraud.[2] To this limitation there is, however, an ex-

1 Macn. & G. 87, 99; Charter v. Trevelyan, 11 Cl. & Fin. 714; Blair v. Bromley, 5 Hare, 542, 559; Sherwood v. Sutton, 5 Mason, 143; Doggett v. Emerson, 3 Story, 700; Michoud v. Girod, 4 How. (U. S.) 503, 561; Cota v. Jones, 8 Pac. Law J. 1044; Dodge v. Essex Ins. Co., 12 Gray, 65; Phalen v. Clark, 19 Conn. 421; Stocks v. Van Leonard, 8 Ga. 511; Martin v. Martin, 35 Ala. 560; Smith v. Fly, 24 Tex. 345; Gibson v. Fifer, 21 Id. 260; Relf v. Eberly, 23 Iowa, 467; Cock v. Van Etten, 12 Minn. 522. It has sometimes been said that *actual concealment* is necessary, and that the mere fact of non-discovery is not enough. This can not mean that the defrauded party must *necessarily* have used some affirmative means to discover the fraud, for he might not have the slightest suspicion of its existence; nor that the fraudulent party must *necessarily* have used some affirmative means to cover up his acts; nor that any *special* duty, such as a trust or fiduciary relation, must rest upon the fraudulent party, different from that which rests upon all such wrongdoers to speak the truth. It can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by reasonable diligence discover it. If the statement means anything more than this, it is in direct conflict with the ablest authorities, and with the very principle upon which the rule itself is based. In Rolfe v. Gregory, *supra*, Lord Westbury said: "As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by the lapse of time, or, generally speaking, by anything done or omitted to be done, *so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.*" In Vane v. Vane, *supra*, James, L. J., said that the statute will not begin to run "until the fraud is first discovered, or might with reasonable diligence have been discovered." See, also, Meader v. Norton, 11 Wall. 442; Township of Boomer v. French, 40 Iowa, 601; Humphreys v. Mattoon, 43 Id. 556; Reed v. Minell, 30 Ala. 61; Wilson v. Ivy, 32 Miss. 233; Buckner v. Calcote, 28 Id. 432; Hudson v. Wheeler, 34 Tex. 356; Munson v. Hallowell, 26 Id. 475; Peck v. Bullard, 2 Humph. 41.

[1] Vane v. Vane, L. R., 8 Ch. 383, 397, *per* James, L. J.; Huguenin v. Baseley, 14 Ves. 273; Bridgeman v. Green, Wilmot's Notes, 58.

[2] See *ante* § 777; Stephens v. Board of Education, 79 N. Y. 183 (trust money fraudulently obtained and then paid to a *bona fide* holder, can not be reached by the equitable owner. A

ception, where the general rule giving relief applies even as against a *bona fide* purchaser. Where an owner has been apparently deprived of his title by a fraudulent conveyance or assignment which is void, as where he was procured to execute it by the fraudulent representation and under the conviction that it was an entirely different instrument, or where it was fraudulently executed in his name without any authority express or implied, or where after being executed by him for one purpose it was fraudulently altered without his knowledge or authority, so as to include the property, or where it was a forgery, and he has done no collateral act with reference to it which might amount to an equitable estoppel by conduct, and the property by means of such transfer comes into the hands of a purchaser for value and without notice, the original defrauded owner is not barred of his remedy.[1] Equity will relieve by canceling the fraudulent apparent transfer, and by compelling a reconveyance or re-assignment even as against the holder who is innocent of wrong; the doctrines of equitable estoppel and of

distinction exists between money and other property. The money was here paid to the holder in satisfaction of an antecedent debt. If other kinds of property had thus been transferred, the transferee would not have been a purchaser for a valuable consideration, according to the rule as settled in New York); Dunklin v. Wilson, 64 Ala. 162 (land sold under a fraudulent decree).

[1] Tayler v. Great Indian etc. Ry., 4 De G. & J. 559, 574; Donaldson v. Gillot, L. R., 3 Eq. 274; B'k of Ireland v. Evans's Charities, 5 H. L. Cas. 389; Vorley v. Cooke, 1 Giff. 230; Ogilvie v. Jeaffreson, 2 Id. 353; Swan v. North British etc. Co., 7 H. & N. 603. See also for limitations, Case v. James, 3 De G. F. & J. 256, 264; Hunter v. Walters, L. R., 11 Eq. 292; *Inre* Barned's B'k'g Co., Id., 3 Ch. 105; Hawkins v. Maltby, Id., 3 Ch. 188; 4 Eq. 572; Cottam v. Eastern Cos. Ry., 1 J. & H. 243; Spaight v. Cowne, 1 H. & M. 359; Dowle v. Saunders, 2 Id. 242, 250; Livingston v. Hubbs, 2 Johns. Ch. 512; County of Schuylkill v. Copley, 67 Pa. St. 386; McHugh v. Co. of Schuylkill, 67 Id. 391, 396. The doctrine of the text, and the cases which support it, are undoubtedly in conflict with some of the American decisions concerning transfers of stock and other things in action cited in the previous section on *priorities;* but they accord completely with the author's views as expressed in that section and in the one on *bona fide purchase.* The conclusions in the text above are intentionally stated with caution and careful limitations, and they can not be extended beyond the limits thus laid down. If the person who fraudulently executes the transfer has any implied authority, even though he acts in direct opposition to his private instructions, or if the original and defrauded owner has done any acts which will operate as an equitable estoppel, then the conclusions of the text can not apply; the equity of the purchaser in good faith will be superior. Some of the cases cited above hold that when the owner has executed and delivered an assignment in blank, and the person to whom it is delivered fraudulently fills up the blanks, and thus conveys the property to a *bona fide* purchaser, such person acts with implied authority, and the owner's rights as against the purchaser are cut off. But when the facts detailed in the text exist, when there is no authority express or implied, and no conduct working an estoppel, there is no ground of principle for preferring the equity of a subsequent claimant, however innocent, over that of the original owner, who is equally innocent, and whose title is prior in time.

bona fide purchase do not apply under these circumstances. Such is the doctrine announced by decisions of the highest authority.

§ 919. **Particular Instances of Jurisdiction.**—I shall conclude this discussion of actual fraud by enumerating some well-settled instances of the jurisdiction which deserve a special mention. In several of them the fraud affects third persons rather than the immediate party to the transaction; but in all a fraudulent intention, or what equity regards as tantamount to such an intention, is a necessary element, and they may all, therefore, be properly grouped under the head of actual fraud. *Judgments.*—When a judgment or decree of any court, whether inferior or superior, has been obtained by fraud, the fraud is regarded as perpetrated upon the court as well as upon the injured party. The judgment is a mere nullity, and it may be attacked and defeated on account of the fraud, in any collateral proceeding brought upon it or to enforce it, at least in the same court in which it was rendered.[1] When a judgment fraudulently recovered in one court is sued upon in another court, whether the fraud can *there* be set up to defeat its enforcement has been questioned.[2] There can be no doubt, however, that under these circumstances, wherever the reformed procedure prevails, the fraud may be set up by way of *equitable* defense, especially if the affirmative relief of cancellation is sought.[3] Although the fraud may thus be set up by way of defense, the equitable jurisdiction to cancel and set aside, or to restrain, judgments and decrees of any court, which have been obtained by a fraud practiced upon the court and the losing party, is well settled and familiar.[4] *Awards.*—The jurisdiction to set

[1] Kerr on Fraud, 293 (Am. ed.); Duchess of Kingston's Case, 2 Smith's Lead. Cas. 609 (7th Am. ed.); Lord Bandon v. Becher, 3 Cl. & Fin. 479, 510; Shedden v. Patrick, 1 Macq. 535; The Queen v. Saddlers' Co., 10 H. L. Cas. 431; Brownsword v. Edwards, 2 Ves. Sen. 243, 246; Harrison v. Mayor etc., 4 De G. M. & G. 137; Perry v. Meadowcroft, 10 Beav. 122; Webster v. Reid, 11 How. (U. S.) 437; Clark v. Douglass, 62 Pa. St. 408; Campbell v. Sloan, Id. 481; Wilson v. Watts, 9 Md. 356; Hall v. Hall, 1 Gill, 383, 391; Carpentier v. Hart, 5 Cal. 406.

[2] Kerr on Fr. 284.

[3] Dobson v. Pearce, 12 N. Y. 156, 166, 168; and see *post*, section on equitable defenses.

[4] A judgment will not, however, be set aside on the ground of fraud, when the very same fraud alleged, and the same questions concerning it, were presented by the issues, litigated, and decided by the court in the judgment which is attacked. U. S. v. Throckmorton, 8 Otto, 61. On the general subject see Dederer v. Voorhies, 81 N. Y. 153; Hunt v. Hunt, 72 Id. 217; Jordan v. Volkenning, Id. 300; Ross v. Wood, 70 Id. 8; Harbaugh v. Hohn, 52 Ind. 243; Harris v. Cornell, 80 Ill. 54; Doughty v. Doughty, 27 N. J. Eq. 315; Holland v. Trotter, 22 Gratt. 136; Babcock v. McCamant, 53 Ill. 214; Graham v. Roberts, 1 Head, 56, 59; Sayles v. Mann, 4 Ill. App. 516; Huxley v. Rice, 40 Mich. 73; Griffin v. Sketoe, 30 Ga. 300; Byers v. Surget, 19 How. (U. S.) 303.

aside and cancel awards was settled at a very early day, and it still exists except so far as it has been regulated or taken away by statute.[1] *Fraudulent bequests.*—Although an entire will can not be set aside on account of fraud, yet a particular devise or bequest may be impressed with a trust in favor of a third person for whom the testator's beneficial intentions have been fraudulently intercepted and prevented by the actual devisee or legatee; and in the same manner the land descending to the heir may be impressed with a trust where he has prevented the testator from making an intended devise by fraudulently representing to the testator that his intention will be carried into effect towards the beneficiary as fully as though the devise were made.[2] Where a *probate* is obtained by fraud, equity may declare the executor or the other person deriving title under it, a trustee

Conversely equity has jurisdiction to aid, by whatever relief may be appropriate, in the enforcement of a valid judgment of another court, when its enforcement is hindered or prevented by fraud; as, for example, where the judgment debtor, pending the suit, transfers or withdraws his property with the intent of rendering the expected judgment nugatory. Blenkinsopp v. Blenkinsopp, 1 De G. M. & G. 495, 500; 12 Beav. 568, 586.

[1] Kerr on Fr. 288; Brown v. Brown, 1 Vern. 156; Earl v. Stocker, 2 Id. 251; Burton v. Knight, 2 Id. 514; Smith v. Whitmore, 2 De G. J. & S. 297; Haigh v. Haigh, 3 De G. F. & J. 157; Craft v. Thompson, 51 N. H. 536; District of Algona v. District etc., 54 Iowa, 286; Emerson v. Udall, 13 Vt. 477. As to what acts or omissions will constitute fraud in an award, Lord Lonsdale v. Littledale, 2 Ves. 451, 453; Calcraft v. Roebuck, 1 Id. 221, 226; Lingood v. Croucher, 2 Atk. 395, Ives v. Metcalfe, 1 Id. 63, 64; Burton v. Knight, 2 Vern. 514; Haigh v. Haigh, 3 De G. F. & J. 157; Blennerhasset v. Day, 2 Ball & B. 104, 116; Gartside v. Gartside, 3 Anstr. 735; Spettigue v. Carpenter, 3 P. Wms. 361; Harding v. Wickham, 2 J. & H. 676; Harvey v. Shelton, 7 Beav. 455; Kemp v. Rose, 1 Giff. 258; Van Cortlandt v. Underhill, 2 Johns. Ch. 339; 17 Johns. 405; Knowlton v. Mickles, 29 Barb. 465; Rand v. Redington, 13 N. H. 72; Lee v. Patillo, 4 Leigh, 436; Emery v. Owings, 7 Gill, 488; Jordan v. Hyatt, 3 Barb. 275; Peters v. Newkirk, 6 Cow. 103; Lutz v. Linthicum, 8 Pet. 165, 178. The whole subject of arbitration and awards, and of the procedure thereon, is very generally a matter of statutory regulation in this country.

[2] McCormick v. Grogan, L. R., 4 H. L. 82, 91, 97, *per* Lord Westbury; Dutton v. Pool, 1 Ventr. 318; Thynn v. Thynn, 1 Vern. 296; Oldham v. Litchfield, 2 Id. 506; Freem. Ch. 284; Devenish v. Baines, Prec. Ch. 3; Chamberlaine v. Chamberlaine, Freem. Ch. 34; Reech v. Kennigate, Ambl. 67; Barrow v. Greenough, 3 Ves. 152; Mestaer v. Gillespie, 11 Id. 621, 638; Chamberlain v. Agar, 2 V. & B. 259, 262; Chester v. Urwick, 23 Beav. 407; Dimes v. Steinberg, 2 Sm. & Giff. 75; Morgan v. Annis, 3 De G. & Sm. 461; Hindson v. Weatherill, 1 Sm. & Giff. 604; 5 De G. M. & G. 301; Podmore v. Gunning, 7 Sim. 644, 660; Russell v. Jackson, 10 Hare, 204, 213; Hege v. Hoge, 1 Watts, 163, 213; Jones v. McKee, 3 Barr, 496; 6 Id. 425, 428; Irwin v. Irwin, 10 Casey, 525; Church v. Ruland, 64 Pa. St. 432, 442; Gaither v. Gaither, 3 Md. Ch. 158; Howell v. Baker, 4 Johns. Ch. 118; Jenkins v. Eldridge, 3 Story, 181. If a testator devises an estate to a son, who promises his father, in consideration of such devise, to pay a certain sum to another son, equity will enforce the promise. Strickland v. Aldridge, 9 Ves. 516, 519; and such an engagement may be made by a silent assent to a proposal by the testator. Byrn v. Godfrey, 4 Ves. 6, 10; Paine v. Hall, 18 Id. 475.

for the party defrauded.[1] *Preventing acts for the benefit of another.*—The jurisdiction in the case of intended testamentary gifts fraudulently prevented, extends to other analogous cases. Where one person has been prevented by fraud from doing an intended act for the benefit of another, equity may relieve the disappointed party by establishing his rights as though the act had been done, and by confirming the title which he would thereby have acquired.[2] *Suppressing instruments.*—Conversely, when instruments have been fraudulently suppressed or destroyed for the purpose of hindering or defeating the rights of others, equity has jurisdiction to give appropriate relief by establishing the estate or rights of the defrauded party.[3]

§ 920. **The Same. Appointments under Powers.**—The jurisdiction of equity in this class of cases is based upon the principle that, in making an appointment under a power, the intention of the donor should be carried out as far as it has been expressed—at least that his intention should not be directly violated. All mere powers, from their very nature, give more or less discretion to the donee. When he refuses to exercise that discretion by failing to make any appointment at all, equity does not, as has been shown, interfere to supply the omission. When the donee is clothed with an *absolute* discretion with respect to the persons whom he may or may not make benefi-

[1] Barnesly v. Powel, 1 Ves. Sen. 284, 287; McCormick v. Grogan. L. R., 4 H. L. 82; Allen v. Macpherson, 1 Phil. 133, 145; 1 H. L. Cas. 191, 213, 214; Kennell v. Abbott, 4 Ves. 802; Charlton v. Coombes, 4 Giff. 382, 385; Wilkinson v. Joughin, L. R., 2 Eq. 319; Podmore v. Gunning, 7 Sim. 644, 660.

[2] Kerr on Fr. 273; Middleton v. Middleton, 1 J. & W. 94, 96 (execution of an instrument prevented by duress and undue influence); Luttrell v. Olmius, cited 11 Ves. 638; 14 Id. 290; 1 J. & W. 96 (an intended recovery prevented, and the estate held as though the recovery had been suffered); as to preventing the execution of deeds, see Buckell v. Blenkhorn, 5 Hare, 131; Vane v. Fletcher, 1 P. Wms. 352; Nanney v. Williams, 22 Beav. 452; Bulkley v. Wilford, 2 Cl. & Fin. 102; West v. Ray, Kay, 385.

[3] Kerr on Fr. 275. For example, if an heir should suppress a deed or will, equity would confirm the title of the grantee or devisee. Of course the proof must be perfectly clear and convincing. Hunt v. Matthews, 1 Vern. 408; Wardour v. Berisford, 1 Id. 452; cited 2 P. Wms. 748, 749; Finch v. Newnham, 2 Vern. 216; Dalston v. Coatsworth, 1 P. Wms. 731; Cowper v. Cowper, 2 Id. 720; Tucker v. Phipps, 3 Atk. 359; Saltern v. Melhuish, Ambl. 247; Hornby v. Matcham, 16 Sim. 325. When an instrument has been intentionally destroyed or suppressed, everything will be presumed against the party by whom the destruction or suppression has been done. Bowles v. Stewart, 1 Sch. & Lef. 209, 222; Eyton v. Eyton, 4 Bro. P. C. 149, 153; Hampden v. Hampden, 3 Id. 550.

If a person obtains a conveyance or other instrument for one particular avowed purpose, and then retains it and uses it for an entirely different purpose, equity, regarding the conduct as fraud, may give such relief as is appropriate. Young v. Peachy, 2 Atk. 254, 256; Wilkinson v. Brayfield, 2 Vern. 307; Goodrick v. Brown, Freem. Ch. 180; Evans v. Bicknell, 6 Ves. 174, 191; Pickett v. Loggon, 14 Id. 215, 234.

ciaries by appointment to or among them, with respect to the shares, the manner, and the like, equity will rarely if ever interfere with any appointment which is actually made, since the court can not say that it violates the donor's intention. When, as is generally the case, the donee, although clothed with a discretion as to whether he will appoint at all, is restricted by the terms of the instrument with respect to the persons to or among whom he may make an appointment, or in respect to other material matters, an appointment made with the intention of violating, and so made that it does violate, this restriction, is regarded by equity as a fraud upon the donor, and upon the persons who would be entitled to the property in default of any appointment, and will be set aside as nugatory. There are two important modes in which an appointment may be thus fraudulent. *First*, where the donee is restricted to a certain class of beneficiaries not including himself, and he intentionally makes an appointment for the purpose of his own benefit, and in such a manner as directly or indirectly to secure his own benefit. An appointment to a person of the prescribed class, with an agreement on his part that, in consideration of the appointment being made to him, he will give or secure to the donee some part of the property or some benefit arising from it, would be an illustration; but the forms of such fraudulent appointment are various. In this species the donee is clearly guilty of actual fraud—a moral wrong. *Secondly*, where the donee is restricted to a certain class of individuals, and he intentionally makes an appointment for the purpose of benefiting, and in such a manner as directly or indirectly to secure the benefit of a third person not belonging to the class specified by the donor. An appointment to one of the prescribed class, with an accompanying agreement on his part to share the property with such a third person, would be an illustration. Such a violation of the donor's intention is treated by equity as a fraud upon the power, although it may not involve any moral wrong in the donee. It is held that, in determining whether any particular appointment is a fraud upon the power, the *motive* with which the power was exercised and the appointment made can not be regarded, but the *purpose* may; in fact, the purpose is the important element. Where the donee holds a *mere* power and makes a fraudulent appointment, the persons who would be entitled to the property upon default of any appointment at all, are the parties to whom equity gives relief, since the appointment is regarded as a nullity and is set aside.

Where the power is *in trust*, the beneficiaries under it, who are entitled to have it executed in their favor, are plainly the parties to whom equity gives relief in case of a complete failure to appoint, or of an imperfect or fraudulent appointment.[1] *Marital rights.*—The rule was well settled in England, that if a negotiation for a marriage had begun, the woman should, while it was pending, without the knowledge of or notice to the intended husband, make a voluntary conveyance or settlement of her own property, and the marriage should be completed by him in ignorance of the transfer, such conveyance or settlement would be a fraud upon the husband's marital rights of property, and would be set aside by a court of equity. The same general doctrine has also been adopted by several early decisions in this country.[2] This doctrine must necessarily be abrogated by the modern legislation in most of the states which destroys all right and interest of the husband in the property of his wife. *Trusts.* One of the most important effects of fraud, and most striking illustrations of the equity jurisdiction, is found in the theory of trusts arising by operation of law. When property, subject to a trust, is fraudulently transferred, or when one person, in fraudulent violation of his fiduciary duty, acquires property which equitably belongs to another, or when one person by his actual fraud obtains the title to property in which another is beneficially interested, equity may work out and protect the rights of the beneficial owner by regarding the property as

[1] Kerr on Fr. 267; Aleyn v. Belchier, 1 Eden, 132; 1 Eq. Lead. Cas. 573, 578, 598, and notes. Although this subject is one of great importance in England, it has little more than a theoretical existence in the law of most of our states. It does not seem necessary, therefore, to enter upon any discussion of the special rules which have been settled, or of the cases which have arisen. The following are some of the recent decisions, and for farther exposition the reader is referred to treatises upon powers. Topham v. Duke of Portland, 1 De G. J. & S. 517; 11 H. L. Cas. 32; Pryor v. Pryor, 2 De G. J. & S., 205; Cooper v. Cooper, L. R. 8 Eq. 312; 5 Ch. 203; *In re*, Huish's Charity, Id., 10 Eq. 5; Arnold v. Woodhams, Id., 16 Eq. 29; Topham v. Duke of Portland, Id., 5 Ch. 40; Roach v. Trood, L. R., 3 Ch. D. 429; Palmer v. Locke, Id., 15 Ch. D. 294; Lane v. Page, Ambl. 233; Lord Hinchinbroke v. Seymour, 1 Bro. Ch. 395; Jackson v. Jackson, 7 Cl. & Fin. 977; Palmer v. Wheeler, 2 Ball. & B. 18, 31; Farmer v. Martin, 2 Sim. 502, 511; Arnold v. Hardwick, 7 Id. 343; Reid v. Reid, 25 Beav. 469, 478; Wellesley v. Mornington, 2 K. & J. 143; *In re* Marsden's Trust, 4 Drew. 594, 601; Routledge v. Dorril, 2 Ves. 357; Birley v. Birley, 25 Beav. 299. The American cases are comparatively very few. The following recognize the general doctrine that equity will not control the exercise of a real discretion given to the donee, but will set aside a fraudulent appointment made under color of such discretion. Lippincott v. Ridgway, 2 Stockt. Eq. 164; Budington v. Munson, 33 Conn. 481; Williams' Appeal, 73 Pa. St. 249; Graeff v. De Turk, 8 Wright; 527; Cloud v. Martin, 2 Dev. & Bat. 274; Haynesworth v. Cox, Harper Eq. 117, 119; Fronty v. Fronty, 1 Bailey Eq. 517, 529; Melvin v. Melvin, 6 Md. 541; Jackson v. Veeder, 11 Johns. 169, 171.

[2] Countes of Strathmore v. Bowes, 1 Ves. 22; 1 Eq. Lead. Cas. 405, 611, 618, and cases in notes by the English and American editors.

though it were actually impressed with a trust in the hands of the one who holds the legal title, by treating such person as though he were an actual trustee, and by enforcing such trust by means of a conveyance, accounting, payment, injunction, and other appropriate remedies. There is no other effect of fraud more remarkable, and none which exhibits more clearly the power of courts of equity to deal with the substantial realities under the appearance of external forms.[1]

§ 921. **The Statute of Frauds not an Instrument of Fraud.**—It is a most important principle, thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud, or in the consummation of a fraudulent scheme.[2] This most righteous principle lies at the basis of many forms of equitable relief, among which are the specific enforcement of verbal agreements for the sale of land which have been partly performed, the reformation and enforcement of agreements and conveyances imperfect through fraud or mistake, the cancellation of fraudulent agreements and conveyances, and the like. One particular instance of relief will be mentioned as an illustration. Where an agreement has been verbally made which the statute requires to be in writing, and through the actual fraud of one party the execution of the written instrument is prevented, and the other party is induced to accept and rely upon the verbal agreement as valid and binding, a court of equity will not permit the fraudulent party to set up the statute of frauds as a defense, but will enforce the agreement against him although it is merely verbal. Of course there must be actual fraud as the distinguishing feature of the transaction, something more than the mere omission to put the contract into writing. The plaintiff must be induced through the deceit, false statements, or concealments of the other party, to waive a written instrument, and to rely upon the parol undertaking. The same relief, it seems, will be given when the execution of a written contract, otherwise fully agreed upon, is prevented by an inevitable accident, as by the death of a party.[3]

[1] See *post* the sections on constructive trusts.

[2] Mestaer v. Gillespie, 11 Ves. 621, 627, 628, per Lord Eldon; Haigh v. Kaye, L. R., 7 Ch. 469; Jervis v. Berridge, Id., 8 Ch. 351; Lincoln v. Wright, 4 De G. & J. 16; Wood v. Midgley, 5 De G. M. & G. 41; Willink v. Vanderveer, 1 Barb. 599; Miller v. Cotten, 5 Ga. 341, 346; Shields v. Trammell, 19 Ark. 51; Trapnall v. Brown, 19 Ark. 39.

[3] Mestaer v. Gillespie, 11 Ves. 621, 627, 628; Montacute v. Maxwell, 1 P.

SECTION IV.

CONSTRUCTIVE FRAUD.

ANALYSIS

§ 922. Definition: essential elements.
§ 923. Three principal classes.
§§ 924–942. *First.* Constructive fraud apparent from the intrinsic nature and subject of the transaction itself.
§ 925. I. Inadequacy of consideration.
§ 926. Inadequacy pure and simple.
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§§ 929–936. II. Illegal contracts and transactions.
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Wms. 618; 1 Stra. 236; 1 Eq. Cas. Abr. 19; Att'y-Gen. v. Sitwell, 1 Y. & C. Ex. 557, 583; Walker v. Walker, 2 Atk. 98; Joynes v. Statham, 3 Atk. 388; Whitchurch v. Bevis, 2 Bro. Ch. 559, 565; Lincoln v. Wright, 4 De G. & J. 16, 22; Wood v. Midgley, 5 De G. M. & G. 41; Cookes v. Mascall, 2 Vern. 200; Taylor v. Luther, 2 Sumn. 228; Jenkins v. Eldridge, 3 Story, 181, 290–293; Phyfe v. Wardell, 2 Edw. Ch. 47; Whitridge v. Parkhurst, 20 Md. 62; Wesley v. Thomas, 6 Har. & J. 24; Walkins v. Stockett, Id. 435; Schmidt v. Gatewood, 2 Rich. Eq. 162; Kinard v. Hiers, 3 Id. 423; Chetwood v. Brittan, 1 Green Ch. 438; Kennedy v. Kennedy, 2 Ala. 571; Collins v. Tillou, 26 Conn. 368; Brown v. Lynch, 1 Paige 147; Sweet v. Jacocks, 6 Paige, 355; Wolford v. Herrington, 74 Pa. St. 311; Murphy v. Hubert, 4 Harris, 59; 7 Barr, 420; Bernard v. Flinn, 8 Ind. 294; Finucane v. Kearney, 1 Freem. 65, 69; Trapnall v. Brown, 19 Ark. 39, 49; Shields v. Trammell, 19 Ark. 51; Childers v. Childers, 1 De G. & J. 482; Davies v. Otty, 35 Beav. 208; Colyer v. Clay, 7 Beav. 188; Symes v. Hughes, L. R., 9 Eq 475; Clarke v. Grant, 14 Ves. 519, 525; compare Blodgett v. Hildreth, 103 Mass. 484; Glass v. Hulbert, 102 Mass. 24; Walker v. Locke, 5 Cush. 90. In Taylor v. Luther, *supra*, Judge Story lays down the doctrine very broadly, more so perhaps than is warranted by the principle or sustained by the authorities. The doctrine of the text, and the foregoing cases, should be considered in connection with the discussion concerning parol evidence in cases of fraud and mistake, near the end of the section on mistake. They lie at the foundation of the conclusions there reached, and fully support them.

§ 935. *D.* Contracts affecting public relations; interfering with the election or appointment of officers; interfering with legislative proceedings; ditto executive proceedings; ditto judicial proceedings.
§ 936. 3. Contracts illegal because opposed to good morals; for illicit intercourse; champerty and maintenance; compounding with a felony or preventing a prosecution.
§§ 937–942. III. Equitable jurisdiction in case of illegal contracts.
§ 937. In usurious contracts; usurious mortgages.
§ 938. In gaming contracts.
§ 939. In other illegal contracts; explanation of maxim, *in pari,* etc.
§ 940. *In pari delicto,* general rules.
§ 941. *In pari delicto,* limitations on general rules.
§ 942. Not *in pari delicto.*
§§ 943–965. *Second.* Constructive fraud inferred from the condition and relations of the immediate parties to the transaction.
§ 943. General description and divisions.
§§ 944–954. I. Transactions void or voidable, with persons wholly or partially incapacitated.
§ 945. Coverture; infancy.
§ 946. Insanity.
§ 947. Mental weakness.
§ 948. Persons *in vinculis;* ditto illiterate or ignorant.
§ 949. Intoxication.
§ 950. Duress.
§ 951. Undue influence.
§ 952. Sailors.
§ 953. Expectants, heirs, reversioners.
§ 954. *Post obit* contracts.
§§ 955–965. II. Transactions presumptively invalid between persons in fiduciary relations.
§ 955. Circumstances to which the principle applies.
§ 956. The general principle.
§ 957. Two classes of cases in which it operates.
§ 958. Trustee and beneficiary.
§ 959. Principal and agent.
§ 960. Attorney and client.
§ 961. Guardian and ward.
§ 962. Parent and child.
§ 963. Other relations: executors and administrators; physician and patient; spiritual advisers; husband and wife; partners, etc.
§ 964. Confirmation or ratification.
§ 965. Acquiescence and lapse of time.
§§ 966–974. *Third.* Frauds against third persons who are not parties to the transaction.
§ 967. Secret bargains accompanying compositions with creditors.
§ 968. Conveyances in fraud of creditors.
§ 969. The consideration.
§ 970. The fraudulent intent.
§ 971. Modes of ascertaining the intent.

§ 972. Existing creditors.
§ 973. Subsequent creditors.
§ 974. Conveyances in fraud of subsequent purchasers.

§ 922. **Definition: Essential Elements.**—The term constructive fraud is not a very appropriate one, but has been used so long that any attempt to substitute another in its place would be useless. It is important, however, to form an accurate notion of the meaning given to it in equity, and of the peculiar element or criterion which distinguishes the various classes of cases belonging to it. The distinguishing element of actual fraud, as has been shown, is always *untruth* between the two parties to the transaction; so that actual fraud may be reduced to misrepresentations and concealments. This untruth at law must be virtually intentional—a falsehood; in equity the intention is not so essential. Untruth is not the distinguishing element of constructive fraud; it is never essential that there should be untruth between the immediate parties to a transaction in order that it may come within the denomination of constructive fraud; in a great many instances it would be impossible to predicate untruth of the wrong-doer's conduct.[1] Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud. It covers different grades of wrong. It embraces contracts illegal, and therefore void at law as well as in equity; transactions voidable in equity because contrary to public policy; and transactions which merely raise a presumption of wrong, and throw upon the party benefited the burden of proving his innocence and the absence of fault.[2] See note § 874 note 2

§ 923. **Three Principal Classes.**—In the great case of Chesterfield v. Janssen, quoted in the preceding section, Lord

[1] It should be carefully observed, however, that in certain instances of constructive fraud, although there is no element of untruth whatever between the two immediate parties to the transaction—the grantor and grantee, donor and donee, promisor and promisee—there is such an element, and even perhaps an intention to deceive, towards a third person, not a party to the transaction, who is the one defrauded, and who obtains relief; *e. g.*, a conveyance by A. to B. with intent to defraud A.'s creditors. This particular species has, therefore, a strong analogy to actual fraud, and the cases belonging to it are governed, to a great extent, by the rules of actual fraud.

[2] The term "presumptive fraud" is sometimes used as a substitute for "constructive fraud," but improperly. In a great number of instances there is no presumption of fraud, in the true sense of that word; and no such presumption could possibly arise.

Hardwicke, after mentioning actual fraud, added the three other following classes: (1) That apparent from the intrinsic nature and subject of the bargain itself; (2) that presumed from the circumstances and condition of the immediate parties to the transaction; (3) that which is an imposition on third persons not parties to the transaction. As these three groups constitute the constructive fraud of equity, the classification of the great chancellor will be adopted in the discussions of the present section.[1]

§ 924. **First. Constructive Fraud Apparent from the Intrinsic Nature and Subject of the Transaction itself.**— This class includes three principal subjects: (1) Inadequacy of consideration; (2) contracts illegal because opposed to statute, or to public policy, or to good morals; and (3) certain transactions which, in analogy with contracts, equity regards as contrary to public policy, and therefore illegal. I shall specify these various instances with as much explanation as may be needed to exhibit the doctrines peculiar to equity, and shall then describe the equitable jurisdiction which they occasion, and the reliefs, defensive or affirmative, which may be obtained by its means.

§ 925. **I. Inadequacy of Consideration.**—Inadequacy of consideration must ordinarily occur either in conveyances, executed or executory contracts of sale, or in agreements analogous to sale where there is a subject-matter transferred or dealt with, and a price paid or to be paid. It may exist in the price or in the subject-matter, the latter case being the same as exorbitancy of price. It necessarily implies that the price is either too small or too great. The former is the condition ordinarily meant by inadequacy, and is plainly more susceptible of judicial investigation than the other. In both these forms inadequacy of consideration will be considered: (1) By itself free from any

[1] Before entering upon the subject, two explanatory statements should be made: (1) Although the divisions are in the main sharply distinguished, yet there are a few particular instances which can not with certainty be allotted to their single appropriate place, since they possess features which are common to two or even to all of the classes. Without attempting to be strictly logical, I have pursued an arrangement which is natural and practical. In this matter of order there is great difference among text-writers. (2) A large number of instances belonging to constructive fraud are simply cases of illegal contracts and of personal incapacity—insanity, infancy, etc.—the rules concerning which are the same at law and in equity, and are found in every treatise upon contracts. Since the main object of the present work is to ascertain when these matters give occasion for the equitable jurisdiction, and to determine the extent of its exercise, it does not seem necessary to enter upon any examination of subjects which properly belong to the general law of contracts. A mere enumeration of those cases of illegality and incapacity which come within the cognizance of equity, is all that is needed.

other fact; (2) as connected with other inequitable facts and circumstances.

§ 926. **Inadequacy Pure and Simple.**—The rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation.[1] In some of the earlier decisons mere inadequacy, either in the price or in the value of the subject-matter, was held to be a sufficient hardship which might defeat the specific performance of an executory when set up as a defense.[2] The doctrine, however, is now settled that *mere* inadequacy—that is, inequality in value between the subject-matter and the price—is not a ground for refusing the remedy of specific performance; in order to be a defense the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud. In short, inadequacy as a negative defense, and as an affirmative ground for a cancellation, is governed by one and the same

[1] Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; Curson v. Belworthy, 3 Id. 742; Meredith v. Saunders, 2 Dow, 514; Gartside v. Isherwood, 1 Bro. Ch. 559; Griffith v. Spratley, 1 Cox, 383, 388; Collier v. Brown, 1 Id. 428; Fox v. Mackreth, 2 Id. 322; 2 Dick. 689; Copis v. Middleton, 2 Madd. 409; Wood v. Abrey, 3 Id. 417; Murray v. Palmer, 2 Sch. & Lef. 474, 488; Erwin v. Parham, 12 How. (U. S.) 197; Eyre v. Potter, 15 Id. 42; Barribeau v. Brant, 17 Id. 43; Slater v. Maxwell, 6 Wall. 268, 273; Warner v. Daniels, 1 Wood. & M. 90, 110; Howard v. Edgell, 17 Vt. 9; Kidder v. Chamberlin, 41 Id. 62; Bedel v. Loomis, 11 N. H. 74; Lee v. Kirby, 104 Mass. 420, 428; Park v. Johnson, 4 Allen, 259; Osgood v. Franklin, 2 Johns. Ch. 1, 23; Seymour v. Delancy, 3 Cow. 445; Worth v. Case, 42 N. Y. 362; Shaddle v. Disborough, 30 N. J. Eq. 370; Ready v. Noakes, 29 Id. 497; Wintermute v. Snyder, 2 Green Ch. 489; Weber v. Weitling, 18 N. J. Eq. 441; Harris v. Tyson, 12 Harris, 347, 360; Davidson v. Little, 10 Id. 245, 247; Cummings's Appeal, 67 Pa. St. 404; Shepherd v. Bevin, 9 Gill, 32; Mayo v. Carrington, 19 Gratt. 74; Cribbins v. Markwood, 13 Id. 495; Butler v. Haskell, 4 Desaus. 651; Juzan v. Toulmin, 9 Ala. 662; Delafield v. Anderson, 7 Sm. & Mar. 630; Steele v. Worthington, 2 Ohio, 182; Weld v. Rees, 48 Ill. 428; Scovill v. Barney, 4 Oreg. 288.

[2] Tilly v. Peers, cited 10 Ves. 301, *per* Ch. B. Eyre; Day v. Newman, 2 Cox, 77, and cited 10 Ves. 300, *per* Lord Alvanley; Savile v. Savile, 1 P. Wms. 745; 5 Vin. Abr. 516, pl. 25. In the celebrated case of Seymour v. Delancy, 6 Johns. Ch. 222, 224, 225, Chan. Kent reached this conclusion after a most able and exhaustive review of all the then existing authorities. His decree was reversed by a bare majority of the court of errors, although all the supreme court judges sustained Chan. Kent's views, S. C., 3 Cow. 445. See, also, Clitherall v. Ogilvie, 1 Desaus. 257; Gasque v. Small, 2 Strobh. Eq. 72; Clement v. Reid, 9 Sm. & Mar. 535.

rule.[1] When a sale is made at public auction, conducted in a fair and open manner, with opportunity for real competition, the rule is even stronger, for fraud can not then be inferred from any inadequacy in the price, without other circumstances showing bad faith.[2] The particular case of selling an expectancy or reversion for an inadequate price, which is in some respects an exception to the foregoing general rule, is considered in the subsequent section.

§ 927. **Gross Inadequacy Amounting to Fraud.**—Although the actual cases in which a contract or conveyance has been canceled on account of gross inadequacy merely, without other inequitable incidents, are very few; yet the doctrine is settled by a consensus of decisions and *dicta*, that, even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for canceling a conveyance or contract whether executed or executory. Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief.[3]

[1] This doctrine was first introduced by Lord Eldon and Sir Wm. Grant, and has since prevailed unchallenged in England, and has generally been adopted in the United States, although not without strong dissent and protest from individual judges. Coles v. Trecothick, 9 Ves. 246; White v. Damon, 7 Id. 30; Underhill v. Horwood, 10 Id. 209; and Stilwell v. Wilkins, Jac. 280, 282, *per* Lord Eldon; Burrowes v. Lock, 10 Ves. 470, *per* Sir Wm. Grant; Lowther v. Lowther, 13 Id. 95, 103, *per* Lord Erskine; Collier v. Brown, 1 Cox, 428; Griffith v. Spratley, 1 Cox, 383; cited 2 Bro. Ch. 179; Bower v. Cooper, 2 Hare, 408; Borell v. Dann, 2 Id. 440; Stephens v. Hotham, 1 K. & J. 571; Callaghan v. Callaghan, 8 Cl. & Fin. 374, 401; Abbott v. Sworder, 4 De G. & Sm. 448; Seymour v. Delancy, 3 Cow. 445; Hale v. Wilkinson, 21 Gratt. 75; Booten v. Scheffer, 21 Id. 474; Shaddle v. Disborough, 30 N. J. Eq. 370; Ready v. Noakes, 29 Id. 497; Rodman v. Zilley, Saxton, 320; Lee v. Kirby, 104 Mass. 420; Western R. R. v. Babcock, 6 Met. 346; Westervelt v. Matheson, 1 Hoff. Ch. 37; Viele v. Troy & B. R. R., 21 Barb. 381; Black v. Cord, 2 Harr. & G. 100; White v. Thompson, 1 Dev. & Bat. Eq. 493; Curlin v. Hendricks, 35 Tex. 225; Harrison v. Town, 17 Mo. 237; Cathcart v. Robinson, 5 Pet. 263; Scovill v. Barney, 4 Oreg. 288.

[2] White v. Damon, 7 Ves. 30, *per* Lord Eldon; Borell v. Dann, 2 Hare, 440, 450, *per* Wigram, V. C.; Ayers v. Baumgarten, 15 Ill. 444; Erwin v. Parham, 12 How. (U. S.) 197 (a debt of $260,000 sold at sheriff's sale for $600). An auction sale will be set aside, and *a fortiori* a specific performance will be refused, when there was actual fraud in conducting it, or the buyer controlled it. Byers v. Surget, 19 How. (U. S.) 303, 309.

[3] Gwynne v. Heaton, 1 Bro. Ch. 1, 9, *per* Lord Thurlow: "An inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it." Gartside v. Isherwood, 1 Bro. Ch. 558, 560; Heathcote v. Paignon, 2 Id. 167, 173; Griffith v. Spratley, 1 Cox, 383, 388, 389; Fox v. Mackreth, 2 Dick. 689; Evans v. Llewellin, 1 Cox, 333; Stilwell v. Wilkins, Jac. 280; Gibson v. Jeyes, 6 Ves. 266, 273; Underhill v. Horwood, 10 Id. 209, 219; Coles v. Trecothick, 9 Id. 234, 246; Morse v. Royal, 12 Id. 355, 373; Peacock v. Evans, 16 Id. 512; Wood v.

§ 928. **Inadequacy Coupled with Other Inequitable Incidents.**—If there is nothing but mere inadequacy of price, the case must be extreme in order to call for the interposition of equity. Where the inadequacy does not thus stand alone,

Abrey, 3 Madd. 417; Borell v. Dann, 2 Hare, 440, 450; Rice v. Gordon, 11 Beav. 265; Cockell v. Taylor, 15 Id. 103, 115; Summers v. Griffiths, 35 Id. 27; Falcke v. Gray, 4 Drew. 651; James v. Morgan, 1 Lev. 111 (exorbitancy of price; the well-known horseshoe case, in which a party stipulated to pay a sum resulting from doubling the amount for every nail in the horse's shoes); Howard v. Edgell, 17 Vt. 9; Kidder v. Chamberlin, 41 Vt. 62; Osgood v. Franklin, 2 Johns. Ch. 1, 23; 14 Johns. 527; Dunn v. Chambers, 4 Barb. 376; Worth v. Case, 42 N. Y. 362; Hodgson v. Farrell, 2 McCart. 88; Gifford v. Thorn, 1 Stockt. Ch. 702; Davidson v. Little, 10 Harris, 245; Hamet v. Dundass, 4 Barr. 178; Sime v. Norris, 8 Phila. 84; Green v. Thompson, 2 Ired. Eq. 365; Barnett v. Spratt, 4 Id. 171; Butler v. Haskell, 4 Desau. 651; Juzan v. Toulmin, 9 Ala. 662; Judge v. Wilkins, 19 Id. 765; Morriso v. Philliber, 30 Mo. 145; Mitchell v. Jones, 50 Id. 438; Kelly v. McGuire, 15 Ark. 555; Deaderick v. Watkins, 8 Humph. 520; Coffee v. Ruffin, 4 Coldw. 487; Tally v. Smith, 1 Id. 290; McCormick v. Malin, 5 Blackf. 509; Knobb v. Lindsay, 5 Ohio, 468; Macoupin Co. v. People, 58 Ill. 191; Madison Co. v. People, 58 Id. 456; Case v. Case, 26 Mich. 484; Byers v. Surget, 19 How. (U. S.) 303; Eyre v. Potter, 15 Id. 42, 60; Veazie v. Williams, 8 Id. 134.

If the inadequacy may be so excessive as to be ground for a cancellation, it may of course be sufficient to defeat the specific performance of an executory contract. Eastman v. Plumer, 46 N. H. 464; Graham v. Pancoast, 6 Casey, 89, 97; Powers v. Mayo, 97 Mass. 180; and see cases in preceding note.

The rule is ordinarily stated that the inadequacy must be so gross that it is *conclusive* evidence of fraud. It is so laid down by earlier judges, and by Mr. Kerr. The rule had its origin at a time when fraud was generally inferred by presumptions of law, and often by conclusive presumptions. In the present condition of the law on the subject of fraud, this mode of formulating the rule seems to be erroneous. The principle is now almost universally adopted that fraud is a *fact*, inferred like other conclusions of fact from the evidence; no rule of law can therefore be laid down as to the amount of inadequacy necessary to produce the resulting fraud. Inadequacy of consideration may be evidence of fraud, slight or powerful, according to its amount and other circumstances. When it is satisfactory and decisive evidence—when from the proof of inadequacy the court or jury are convinced that fraud as a fact did exist, then the relief is granted. Instead therefore of repeating the usual formula which has been handed down for generations, that the inadequacy must be conclusive evidence of fraud, I have said in the text that it must be satisfactory and decisive evidence; the former mode represented fraud as the result of a conclusive legal presumption; the latter treats it as a conclusion of fact drawn from the evidence, and is therefore in perfect harmony with the theory which now prevails in most if not all of the states. The following seems to be the true *rationale* of the doctrines concerning inadequacy of price. Whenever it appears that the parties have knowingly and deliberately fixed upon any price, however great or however small, there is no occasion nor reason for interference by courts, for owners have a right to sell property for what they please, and buyers have a right to pay what they please. See Harris v. Tyson, 12 Harris, 347, 360; Davidson v. Little, 10 Id. 245, 247. But where there is no evidence of such knowledge, intention, or deliberation by the parties, the disproportion between the value of the subject-matter and the price may be so great as to warrant the court in inferring therefrom the *fact* of fraud. Such a gross inadequacy or disproportion will call for explanation, and will shift the burden of proof upon the party seeking to enforce the contract, and will require him to show affirmatively that the price was the result of a deliberate and intentional action by the parties; and if the facts do prove such action, the fact of fraud will be

but is accompanied by other inequitable incidents, the relief is much more readily granted. But even here the courts have established clearly marked limitations upon the exercise of their remedial functions, which should be carefully observed. The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not of itself a sufficient ground for relief, provided the parties were both able to judge and act independently, and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstance of oppression.[1] When the accompanying incidents are inequitable

more readily and clearly inferred. I do not mean that judges and juries are no longer under any circumstances aided by legal presumptions in dealing with fraud. The number of instances, however, in which legal presumptions are invoked, has been very much lessened; the issue of fraud or no fraud, is generally decided in the same manner as any other issue of fact.

The Roman law adopted a fixed standard by which to determine all cases of inadequacy, which was one half of the real value of the subject-matter when that consisted of immovable property. If the price was less than one half of the real value, the seller could compel the buyer to elect either to rescind, restore the thing and take back the price, or to affirm and make up the deficiency. Code, lib. 14, tit. 44, § 2; and see Nott v. Hill, 2 Chan. Cas. 120, per Lord Nottington; Burrowes v. Lock, 10 Ves. 470, 474, per Sir Wm. Grant. A like method is found in the French law. Such arbitrary rules are entirely contrary to the spirit of our law, and our methods of administering justice. If the price was less than one half of the value of the subject-matter, and there were no circumstances showing an intention on the part of the vendor to confer a bounty or favor, the sale would doubtless be set aside. Where the circumstances show that a favor or bounty was intended, the inference of fraud is necessarily destroyed; even a pure gift would be sustained. Whalley v. Whalley, 1 Meriv. 436.

As to the time of the inadequacy, in order that it may ever be fatal, it must exist at the concluding of the contract. If there was no inadequacy at the making of the contract, none can arise from subsequent events or change of circumstances. Mortimer v. Capper, 1 Bro. Ch. 156; Batty v. Lloyd, 1 Vern. 141; Hale v. Wilkinson, 21 Gratt. 75; Lee v. Kirby, 104 Mass. 420. The old case of Savile v. Savile, 1 P. Wms. 745, was decided otherwise, but has long been overruled on this point. See, however, the somewhat remarkable case of Willard v. Tayloe, 8 Wall. 557, which was really an instance of the price becoming inadequate by subsequent events. This rule is subject to a certain modification in suits for the specific performance of contracts. If a plaintiff, instead of obtaining his remedy promptly as soon as he was able, should unnecessarily delay, and should not bring a suit until, by his delay or change of circumstances, the price or subject-matter had become inadequate, a specific enforcement might and generally would be refused. Booten v. Scheffer, 21 Gratt. 474; Whitaker v. Bond, 63 N. C. 290; Hudson v. King, 2 Heisk. 560; McCarty v. Kyle, 4 Coldw. 348.

[1] Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; Merediths v. Saunders, 2 Dow, 514; Blackie v. Clark, 15 Beav. 595; Denton v. Donner, 23 Id. 285, 291; Toker v. Toker, 31 Id. 629; Dunn v. Chambers, 4 Barb. 376; Green v. Thompson, 2 Ired. Eq. 365; Juzan v. Toulmin, 9 Ala. 662; Scovill v. Barney, 4 Oreg. 288. Harrison v. Guest, *supra*, is a very illustrative case. An old man of seventy-one, bedridden, illiterate, without any independent professional advice, and without consulting his friends or relatives, conveyed property worth £400, for the consideration of being pro-

and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances combined with inadequacy of price may easily induce a court to grant relief defensive or affirmative. It would not be correct to say that such facts constitute an absolute and necessary ground for equitable interposition. They operate to throw the heavy burden of proof upon the party seeking to enforce the transaction or claiming the benefits of it, to show that the other acted voluntarily, knowingly, intentionally, and deliberately, with full knowledge of the nature and effects of his acts, and that his consent was not obtained by any oppression, undue influence, or undue advantage taken of his condition, situation, or necessities. If the party upon whom the burden rested should succeed in thus showing the perfect good faith of the transaction, it would be sustained; if he should fail, equity would grant such relief affirmative or defensive as might be appropriate.[1] There are

vided with board and lodging during the rest of his life; he lived only six weeks after the conveyance; his representatives sought to have the conveyance set aside. The evidence showed that he had refused to employ professional advice for himself, that he was able to understand the nature of the transaction, and that there were no circumstances of oppression; the court held that there was not sufficient ground to impeach the conveyance. In Scovill v. Barney, *supra*, the court said that inadequacy of consideration, or mental weakness, standing alone, will not warrant the interposition of equity; but when both are combined, relief will be granted. It is, perhaps, not possible to reconcile this naked proposition with the authorities.

[1] Deane v. Rastron, 1 Anstr. 61; Lewis v. Lord Lechmere, 10 Mod. 503; Clarkson v. Hanway, 2 P. Wms. 203; Ardglasse v. Muschamp, 1 Vern. 236; Gartside v. Isherwood, 1 Bro. Ch. 558; Evans v. Llewellin, 1 Cox, 333; Morse v. Royal, 12 Ves. 355, 373; Pickett v. Loggon, 14 Id. 231; Murray v. Palmer, 2 Sch. & Lef. 474, 486; Falkner v. O'Brien, 2 Ball & B. 220; Griffiths v. Robins, 3 Madd. 191; Wood v. Abrey, 3 Id. 417; Willan v. Willan, 2 Dow, 274; Collins v. Hare, 2 Bligh N. S. 106; McDiarmid v. McDiarmid, 3 Id. 374; Smith v. Kay, 7 H. L. Cas. 750; Dent v. Bennett, 4 My. & Cr. 269, 273; Gibson v. Russell, 2 Y. & C. Ch. 104; Prideaux v. Lonsdale, 1 De G. J. & S. 433; Tate v. Williamson, L. R., 2 Ch. 65; 1 Eq. 528; Rhodes v. Bate, Id., 1 Id. 252; Sturge v. Sturge, 12 Beav. 229, 244; Cockell v. Taylor, 15 Id. 103, 115; Cooke v. Lamotte, Id. 234; Grosvenor v. Sherratt, 28 Id. 659; Summers v. Griffiths, 35 Id. 27; Longmate v. Ledger, 2 Giff. 157; Powers v. Hale, 5 Fost. (N. H.) 145; Howard v. Edgell, 17 Vt. 9; Mann v. Betterly, 21 Id. 326; Osgood v. Franklin, 2 Johns. Ch. 1, 24; Hall v. Perkins, 3 Wend. 626; Kloepping v. Stellmacher, 21 N. J. Eq. 328 (mistake and inadequacy in a sheriff's sale); Graham v. Pancoast, 6 Casey, 89 (age of a party); Henderson v. Hays, 2 Watts, 148, 151 (intemerance and weakened mind); Campbell v. Spencer, 2 Binn. 133 (ditto); Todd v. Grove, 33 Md. 188; Brooke v. Berry, 2 Gill, 83; McKinney v. Pinckard, 2 Leigh, 149; Clitherall v. Ogilvie, 1 Desau. 257 (one party young and inexperienced, the other mature and cunning); Neeley v. Anderson, 2 Strobh. Eq. 262; Gasque v. Small, Id. 72; Bunch v. Hurst, 3 Desau. 273; Maddox v. Simmons, 31 Ga. 512; Wormack v. Rogers, 9 Id. 60; Blackwilder v. Loveless, 21 Ala. 371 (undue advantage of party's pecuniary necessities—

cases, however, which theoretically call for the interposition of equity on account of such circumstances of bad faith, as well as other forms of fraud, but in which no relief can actually be given; because the contract—conveyance or settlement—being *executed*, the parties can not be restored to their original position.[1] Some special rules as to the effect of a false statement of the consideration in a conveyance, and as to the evidence admissible to impeach or to sustain the consideration recited, are collected in the foot-note.[2]

an instructive case); Harrison v. Town, 17 Mo. 237; Holmes v. Fresh, 9 Mo. 200; Cadwallader v. West, 48 Id. 483 (physician and patient); Mitchell v. Jones, 50 Id. 438 (mistake and inadequacy in a partition sale); Newland v. Gaines, 1 Heisk. 720; Benton v. Shreeve, 4 Ind. 66; Modisett v. Johnson, 2 Blackf. 431; McCormick v. Malin, 5 Id. 509; Fish v. Leser, 69 Ill. 394 (ignorance and fear of one party, concealment of value and undue advantage by the other, a very instructive case); Cathcart v. Robinson, 5 Pet. 263; Byers v. Surget, 19 How. (U. S.) 303.

When the inadequacy appears in a contract between a parent and child, or between other near relatives, the circumstances may be such that all suspicion of fraud or hardship is removed by the fact of relationship. This would especially be so if the one obtaning the benefit, and from whom the inadequate consideration comes, is a person who would naturally be a recipient of the other party's bounty. Shepherd v. Bevin, 9 Gill, 32, 39, *per* Frick, J.; Hays v. Hollis, 8 Gill, 357; Haines v. Haines, 6 Md. 435; White v. Thompson, 1 Dev. & Bat. Eq. 493; Fripp v. Fripp, 1 Rice Eq. 84. On the other hand, in transactions between the same class of parties, the circumstances may be such as to raise a strong inference, if not even a presumption of bad faith. The fact of inadequacy in a contract between near relatives, and especially when the party obtaining the benefit is in a position of natural superiority and command over the other—as a father and child, an elder brother and younger sister—might raise a strong inference and even presumption of undue influence, and thus call for the interposition of a court. Whelan v. Whelan, 3 Cow. 537; and see Callaghan v. Callaghan, 8 Cl. & Fin. 374. The questions concerning inadequacy of price accompanied by other inequitable incidents can not, in practice, be easily separated from the more comprehensive subjects of undue influence and fiduciary relations, and will be more fully illustrated in the subsequent paragraphs which treat of those topics.

[1] The most striking illustration is that of marriage settlements, since the parties can not be unmarried. North v. Ansell, 2 P. Wms. 619.

[2] See Kerr on Fr., p. 191. A false statement of the consideration does not necessarily vitiate a deed. Bowen v. Kirwan. Lloyd & G. 47. But it may, in some cases, invalidate the entire transaction. Bowen v. Kirwan, *supra*; Uppington v. Bullen, 2 Dr. & War. 184; Gibson v. Russell, 2 Y. & C. Ch. 104. In general, where no consideration at all is expressed in a deed, a party may prove the actual consideration to support it; and where a consideration is expressed, a party may prove any other actual consideration if not wholly inconsistent with that stated. Hartopp v. Hartopp, 17 Ves. 184, 192; Clifford v. Turrell, 1 Y. & C. Ch. 138; S. C. on app., 14 L. J. Ch. 390; Nixon v. Hamilton, 2 Dr. & Wal. 364, 387. To this general rule there is the limitation that, where the consideration expressed in a deed is impeached on account of fraud, the party claiming under the conveyance can not sustain it by proving another consideration different from that stated. Clarkson v. Hanway, 2 P. Wms. 203; Bridgman v. Green, 2 Ves. Sen. 627; Watt v. Grove, 2 Sch. & Lef. 492, 501; Willan v. Willan, 2 Dow, 274. If a pecuniary consideration is stated in the deed, and is impeached, the party can not show and rely on the consideration of blood, or love and affection. Clarkson v. Hanway, *supra;* Willan v. Willan, *supra.* If the recitals state a pecuniary consideration, and the operative part mentions love and affection as being in part the con-

§ 929. **II. Illegal Contracts and Transactions.**—In this subdivision I shall merely enumerate the most important kinds of illegal contracts and transactions which *may* permit the interposition of equity, with such very brief description as shall seem necessary. The general subject of illegality in the terms or the consideration, with the special rules which define its extent, limitations, and exceptions, will be found in treatises upon contracts to which the reader is referred. The equitable jurisdiction which may be exercised on the occasion of such transactions is described in the following subdivision. It is sufficient at present to say, that a court of equity does not aid a party to *enforce* an illegal transaction which is still executory, in pursuance of the principle embodied in the maxim, *ex turpi causa non oritur actio*. It may, however, grant the affirmative relief of cancellation or injunction in such a condition, when the defense would not be available at law. If the contract has been executed by the payment of the money, conveyance or delivery of the property, and the parties have equally participated in the wrong, and are equally in fault, the court, unless compelled to do so by statute, does not generally interpose its aid. The maxims *in pari delicto potior est conditio possidentis*, and *potior est conditio defendentis*, are then controlling. Affirmative relief is sometimes prescribed by statute, as in usurious and gaming contracts. When the parties are not *in pari delicto*, equity may give affirmative relief to the one who is comparatively innocent.

§ 930. **1. Contracts Illegal because Contrary to Statute.** I place under this head those few instances in which the illegality is wholly or chiefly the result of statutory prohibition. Very

sideration of the deed, this discrepancy is not sufficient to raise a presumption of fraud. Filmer v. Gott, 4 Bro. P. C. 230; Whalley v. Whalley, 3 Bligh, 1, 13. If the transaction on which a deed is represented to be based, and the consideration for which it purports to be given, are stated untruly, and this untruth would operate fraudulently, the instrument may lose all of its validity in equity, even though it can not be attacked at law. Watt v. Grove, 2 Sch. & Lef. 492, 504. A deed between parties, one of whom is subject to the influence of the other, should contain a fair and truthful statement of the transaction. If the statement of the consideration is untrue, the instrument can not be upheld. The party seeking to uphold it can not prove, in order to sustain it, that the actual consideration was partly that represented in the deed and partly something else, since this would be inconsistent with the consideration stated on the face of the instrument. Ahearne v. Hogan, Drury, 310; Uppington v. Bullen, 2 Dr. & War. 184; Clifford v. Turrell, 1 Y. & C. Ch. 138; Gibson v. Russell, 2 Y. & C. Ch. 104. A statement of a consideration where there was actually none, or a wrong statement of the consideration, or other suspicious circumstances may shift the burden of proof from the party attacking a deed to the one sustaining it. Watt v. Grove, 2 Sch. & Lef. 492, 502; Griffiths v. Robins, 3 Madd. 191; Gibson v. Russell, 2 Y. & C. Ch. 104; Ahearne v. Hogan, Drury, 310; Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481.

many of the contracts illegal at the common law, because opposed to public policy or to good morals, have also been brought within the domain of positive legislation in the various states; and a very few which are illegal by the English common law, are not generally made so by the law of this country. The important species which fall under the present head, are usurious, gaming, and smuggling contracts. The policy of prohibiting usury has been abandoned, and the statutes concerning it repealed, in England and in several of the American states. In some of the states which still adhere to the policy, the usurious contract itself, the instrument by which it is evidenced, and all its securities, are declared to be utterly void; in others, the stipulation for the usurious excess over the legal interest is alone made void; while in others a further penalty is added to this usurious excess.[1] Although at the common law certain kinds of contracts based upon wagers were not unlawful, while those made upon a gaming consideration were illegal, the modern legislation of England and of the United States declares all gaming and wagering agreements, and the instruments by which they are evidenced or secured, to be illegal, null, and void.[2] The subject of smuggling belongs to the exclusive province of the national legislature, and forms a part of the customs revenue system. All contracts entered into in the course of smuggling operations, or made for the purpose of aiding, abetting, or procuring smuggling, are null and void.[3]

§ 931. **2. Transactions Illegal because Opposed to Public Policy. A. Contracts Interfering with the Freedom of Marriage.**—The law of England and our own law regard

[1] Waller v. Dalt, 1 Ch. Cas. 276; 1 Dick. 8; Barker v. Vansommer, 1 Bro. Ch. 149; Scott v. Nesbit, 2 Id. 641; 2 Cox, 183; Bosanquett v. Dashwood, Cas. temp. Talb. 39; Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143.

[2] Rawden v. Shadwell, Ambl. 269; Woodroffe v. Farnham, 2 Vern. 291; Da Costa v. Jones, Cowp. 729; Robinson v. Bland, 2 Burr. 1077; Skipwith v. Strother, 3 Rand. 214; Dade v. Madison, 5 Leigh, 401; Wilkinson v. Tousley, 16 Minn. 299. The ordinary so-called time contracts purporting to be for the purchase of stocks, but in reality wholly speculative, and without any intention to sell or buy specific stocks, but only to gain or lose the difference resulting from the rise or fall of the market price, are clearly within the definition gaming contracts and therefore void. If they are made in good faith with the intention of actually selling and buying certain specific stocks to be obtained by the vendor in the future, they have no element of invalidity. See Story v. Salomon, 71 N. Y. 420; Brua's Appeal, 55 Pa. St. 294; Smith v. Bouvier, 70 Id. 325; Kirkpatrick v. Bonsall, 72 Id. 155; Maxton v. Gheen, 75 Id. 166; Cole v. Milmine, 88 Ill. 349. An offer to pay a premium to the owner of a horse that shall "make the quickest time" at an agricultural fair etc., is not opposed to public policy, Alvord v. Smith, 63 Ind. 58. In Harris v. White 81 N. Y. 532, and cases cited, the meaning of "bet," "wager," and "stakes," is determined.

[3] Adams on Eq. 360 [175].

the marriage relation as the very foundation of society. Since the true conception of marriage assumes and requires a perfectly *free* consent and union of the two spouses, equity has, from its earliest periods, treated all agreements, executory or executed, between the immediate parties or between third persons, which might directly or indirectly interfere in any degree with this absolute freedom, either by promoting or restraining marriage, as opposed to public policy and illegal; and has therefore declared them null and void. Although a court of equity will apply this principle in whatever kind of agreement the illegality may appear, yet there are certain well-defined forms of these contracts which have received judicial condemnation. The following are the most important: Marriage brokerage contracts, by which one party agrees, for a consideration, to negotiate or procure a marriage for the other. Courts of equity have condemned these agreements with an especial emphasis. They are absolutely void, without the slightest regard to the situation of the spouses, or the fitness of the marriage between them in the particular case. They are so utterly null, that they can not be ratified and confirmed; and it has even been held that money paid in pursuance of them may be recovered back.[1] Contracts in restraint of marriage.—While mutual promises by a man and a woman to marry each other are of course valid, although they are thereby prevented from marrying others, agreements not to marry at all, or not to marry any one unless it be the promisee, without any corresponding stipulation by that party, as well as more general forms of contract restraining the freedom and power of marriage, are void.[2] Rewards for marriages.—Agreements to pay a reward or compensation to a parent or guardian for procuring or consenting to a marriage with his daughter or ward, are clearly void.[3] Secret contracts

[1] These contracts seem to have been quite frequent at an early day. Hall v. Potter, Shower P. C. 76; 3 Lev. 411 (can not be confirmed); Roche v. O'Brien, 1 Ball & B. 330, 358 (ditto); Smith v. Bruning, 2 Vern. 392 (money recovered back); Goldsmith v. Bruning, 1 Eq. Cas. Abr. 89 (ditto); Cole v. Gibson, 1 Ves. Sen. 503, 506, 507; Roberts v. Roberts, 3 P. Wms. 66, 74; Arundel v. Trevillian, 1 Ch. Rep. 87; Law v. Law, Cas. temp. Talb. 140, 142; Drury v. Hooke, 1 Vern. 412; Vauxhall B'd'ge Co. v. Spencer, Jac. 64, 67; Williamson v. Gihon, 2 Sch. & Lef. 357; Boynton v. Hubbard, 7 Mass. 112; and see 2 Eq. Lead. Cases, 494–499 (4th Am. ed.), note to Scott v. Tyler.

[2] Lowe v. Peers, 4 Burr. 2225; Baker v. White, 2 Vern. 215; Key v. Bradshaw, 2 Id. 102; Woodhouse v. Shepley, 2 Atk. 535, 539, 540; Atkins v. Farr, 1 Id. 287; Cock v. Richards, 10 Ves. 429; England v. Downs, 2 Beav. 522; Phillips v. Medbury, 7 Conn. 568; Conrad v. Williams, 6 Hill, 444; see 2 Eq. Lead. Cases, 494–499.

[3] Keat v. Allen, 2 Vern. 588; Stribblehill v. Brett, 2 Id. 445; Peyton v. Bladwell, 1 Id. 240; Crawford v. Russell, 62 Barb. 92.

in fraud of marriage.—Secret agreements of any kind or form, concealed from one or both of the spouses, the object of which is to promote a particular marriage, or to induce one or both the parties to enter into a marriage, are plainly opposed to public policy and void.[1] Secret agreements to marry between a man and woman, for the purpose of deceiving or misleading a parent or relative of one of the parties, have been declared void.[2] Analogous to marriage brokerage contracts, and depending upon the same reasons, are agreements to pay a compensation to a person for using his influence with a testator to procure a will, devise, or bequest to be made in favor of the promising party.[3]

§ 932. **Agreements for a Separation.**—Whatever may have been the opinion at an earlier day, it is now thoroughly settled that agreements for a separation between husband and wife, if valid in form, made upon a sufficient consideration, and executed by parties legally capable of contracting, are not illegal; they will even be specifically enforced in equity, by decreeing the execution of the proper deed, and by restraining either party from personally interfering with the other in violation of their covenants.[4] The agreement, however, must be made upon a valuable consideration accruing to the husband's benefit;[5] and

[1] Such cases must depend largely upon their own special circumstances. Gale v. Lindo, 1 Vern. 475; Redman v. Redman, Id. 348; Neville v. Wilkinson, 1 Bro. Ch. 543; Palmer v. Neave, 11 Ves. 165. In McClurg v. Terry, 21 N. J. Eq. 225, a marriage entered into in sport was declared void. Of the same general character with the contracts mentioned in the text, are those contracts secretly made for the purpose of rendering nugatory the stipulations of marriage agreements, or the acts agreed to be done in a negotiation for a marriage, or for the purpose of defrauding either or both the spouses or their relatives. See Peyton v. Bladwell, 1 Vern. 240; Turton v. Benson, 1 P. Wms. 496; Scott v. Scott, 1 Cox, 366; Dalbiac v. Dalbiac, 16 Ves. 116, 124; Morris v. Clarkson, 1 J. & W. 107; Lamlee v. Hanman, 2 Vern. 499; Barret v. Wells, Prec. Ch. 131; Jones v. Martin, 3 Austr. 882; Randall v. Willis, 5 Ves. 261; McNeill v. Cahill, 2 Bligh, 228; Stocken v. Stocken, 4 My. & Cr. 95; Bell v. Clarke, 25 Beav. 437; Kerr on Fr. 216, 217.

[2] Woodhouse v. Shepley, 2 Atk. 536; Cock v. Richards, 10 Ves. 429.

[3] Debenham v. Ox, 1 Ves. Sen. 276. While such contracts are clearly void, agreements between the heirs or near relatives of a testator, in anticipation of a will, stipulating to share equally the property which may be bequeathed to them, are valid, and are rather favored by courts of equity. Beckley v. Newland, 2 P. Wms. 182; Harwood v. Tooke, 2 Sim. 192; Wethered v. Wethered, 2 Sim. 183.

[4] Wilson v. Wilson, 1 H. L. Cas. 538; 5 Id. 40; 14 Sim. 405; Fletcher v. Fletcher, 2 Cox, 99; Sanders v. Rodway, 22 L. J. Ch. (N. S.) 230; Gibbs v. Harding, L. R., 5 Ch. 336; 8 Eq. 490; Besant v. Wood, Id., 12 Ch. D. 605; Hunt v. Hunt, 4 De G. F. & J. 221, 235; McCrocklin v. McCrocklin, 2 B. Mon. 370. See *per contra*, Aylett v. Ashton, 1 My. & Cr. 105; Duke of Bolton v. Williams, 2 Ves. 138.

[5] Wilson v. Wilson, *supra;* Wellesley v. Wellesley, 10 Sim. 256; Stephens v. Olive, 2 Bro. Ch. 90; Earl of Westmeath v. Countess of Westmeath, Jac. 126, 141; Elworthy v. Bird, 2 S. & S. 372; Hobbs v. Hull, 1 Cox, 445.

under the strict common law rules, a third person must be added as a trustee and contracting party on behalf of the wife, so that the stipulations on her side may be binding [1]

§ 933. **B. Conditions and Limitations in Restraint of Marriage.**—Intimately connected with contracts in restraint of marriage, and depending upon the same principle, are conditions and limitations operating in like manner annexed to or forming part of testamentary dispositions, or of family settlements, or similar gifts. Although the subject, in some of its special applications and phases, is still more confused and uncertain than perhaps any other branch of equity jurisprudence, yet certain general rules have been established beyond all further controversy.[2] Two propositions lie at the foundation, and are recognized by all the authorities: (1) It is ordinarily said that all conditions annexed to gifts which prohibit marriage *generally* and absolutely, are void and inoperative. This, however, is a very inaccurate mode of statement, since a condition *precedent* annexed to a devise of land, even if in complete restraint, will, if broken, be operative and prevent the devise from taking effect. With this limitation all conditions in general restraint are void. Also, if a condition is not in absolute restraint, but is of such form that it will *probably* operate as a general prohibition, it is, under the same limitation, void.[3] (2) On the other hand, conditions annexed to testamentary or other gifts, in partial and reasonable restraint of marriage, are valid and operative; such, for example, as that a devisee or legatee should not marry under age, or should not marry without the consent of parents, guardians, or trustees, or should or should

[1] Hope v. Hope, 26 L. J. Ch. 417; Wilkes v. Wilkes, 2 Dick. 791; Vansittart v. Vansittart, 4 K. & J. 62. Such additional party would clearly be unnecessary in many states of this country.

[2] The direct civil law origin of these rules, and also the difference between certain dogmas of the civil law and the corresponding doctrines of English equity, are fully explained in Stackpole v. Beaumont, 3 Ves. 89, 96, *per* Lord Loughborough, and in Scott v. Tyler, 2 Bro. Ch. 431; 2 Dick. 712, *per* Lord Thurlow.

[3] Scott v. Tyler, 2 Bro. Ch. 431; 2 Dick. 712; 2 Eq. Lead. Cas. 429, 475 (4th Am. ed.); Keily v. Monck, 3 Ridgw. P. C. 205, 244, 247, 261; Hervey v. Aston, 1 Atk. 361; Stackpole v. Beaumont, 3 Ves. 89, 95; Rishton v. Cobb, 9 Sim. 615, 619; Morley v. Rennoldson, 2 Hare, 570; Connelly v. Connelly, 7 Moo. P. C. 438; Long v. Dennis, 4 Burr. 2052; Maddox v. Maddox, 11 Gratt. 804; Waters v. Tazewell, 9 Md. 291. The same is true of other conditions opposed to public policy, annexed to testamentary gifts, *e. g.*, preventing husband and wife from living together, tending to procure a divorce, and the like. Tennant v. Braie, Tothill, 141; Brown v. Peck, 1 Eden, 140; Wren v. Bradley, 2 De G. & Sm. 49; but see Cooper v. Remsen, 5 Johns. Ch. 459, which hardly seems to be sustained by the weight of authority. A condition that a legacy to a daughter should cease if she became a nun, has been held valid, although there was no gift over. *In re* Dickson's Trusts, 1 Sim. N. S. 37, 46; Clavering v. Ellison, 8 De G. M. & G. 662; 7 H. L. Cas. 707.

not marry a particular person, or a person belonging to a particular religious communion.[1] In the application of these two propositions, certain special rules have been settled with more or less certainty depending upon the facts of the condition being precedent or subsequent, of there being or not a gift over upon its breach, and of the original gift to which the condition is annexed being one of real or of personal estate.[2] The system

[1] Scott v. Tyler, *supra;* Stackpole v. Beaumont, 3 Ves. 89; Younge v. Furse, 8 De G. M. & G. 756; Allen v. Jackson, L. R., 1 Ch. D. 399, reversing S. C., L. R., 19 Eq. 631; Desbody v. Boyville, 2 P. Wms. 547; Jervis v. Duke, 1 Vern. 19; Randal v. Payne, 1 Bro. Ch. 55; Clarke v. Parker, 19 Ves. 1; Dashwood v. Bulkley, 10 Id. 229; Lloyd v. Branton, 3 Meriv. 108; Haughton v. Haughton, 1 Moll. 611; Duggan v. Kelly, 10 Ir. Eq. Rep. 295; Collier v. Slaughter, 20 Ala. 263; Graydon v. Graydon, 23 N. J. Eq. 229.

[2] I add a brief summary of these rules, together with some of the most important decisions illustrating them. There is, however, a very great conflict of judicial opinion with respect to their nature, extent, and operation. Some of the ablest judges have confessed that, amid all the uncertainty resulting from a comparison of the decisions, each case must, to a great extent, depend upon its own circumstances.

Whether there is or is not a gift over.—If a condition is in absolute restraint and therefore void, it could make no difference whether there was a gift over or not. Where there is a gift over, and the condition is partial and reasonable, the gift over takes effect on a breach of the condition. Clarke v. Parker, 19 Ves. 1, 13; Lloyd v. Branton, 3 Meriv. 108, 117, 119; Stratton v. Grymes, 2 Vern. 357; Barton v. Barton, Id. 308; Wheeler v. Bingham, 3 Atk. 364, 367; Malcolm v. O'Callaghan, 2 Madd. 349, 353; see Poole v. Bott, 11 Hare, 33. Where there is no gift over, the condition, although only partial, may be inoperative and merely *in terrorem*, and this seems to be the settled rule whenever the condition is annexed to a bequest of personal estate. Hervey v. Aston, 1 Atk. 361, 375, 377; Reynish v. Martin, 3 Id. 330; Wheeler v. Bingham, Id. 364; Pullen v. Ready, 2 Id. 587; Hicks v. Pendarvis, 2 Freem. 41; Long v. Dennis, 4 Burr. 2052, 2055; Parsons v. Winslow, 6 Mass. 169.

Gifts of real or of personal estate. In devises and other gifts of real estate, courts of equity follow the rules of the common law concerning the operation of conditions generally, and their effects upon the vesting and divesting of estates. In gifts of real estate, therefore, when a condition in restraint of marriage is *precedent*, and is broken, it prevents the estate from vesting at all, whether the restraint be absolute or partial, and whether there be a gift over or not. When the condition is *subsequent* and void, it is entirely inoperative, and the donee retains the property unaffected by its breach. When the condition is subsequent and valid, on its breach the donee's estate ceases; if there is a gift over, that gift takes effect; if there is none, then it seems the heir may re-enter and take the property. Bertie v. Lord Falkland, 2 Ch. Cas. 129; 2 Vern. 333; 2 Freem. 220; Fry v. Porter, 1 Ch. Cas. 138; 1 Mod. 300; Hervey v. Aston, 1 Atk. 361; Reynish v. Martin, 3 Id. 330; Long v. Ricketts, 2 S. & S. 179; Commonwealth v. Stauffer, 10 Barr. 350; and see 2 Eq. Lead. Cas. 478–480 (4th Am. ed.), Eng. ed. notes to Scott v. Tyler.

Gifts of personal estate.—In deciding upon the effect of the conditions when annexed to these dispositions, courts of equity have not followed the common law doctrines concerning conditions. Where the condition is *subsequent* and in unreasonable restraint, it is void, and the legacy becomes absolute, whether there is or is not a gift over. Morley v. Rennoldson, 2 Hare, 570; Bellairs v. Bellairs, L. R., 18 Eq. 510. Where the condition is *subsequent*, partial, and reasonable, and there is a gift over, then it is operative, and on its breach the gift over takes effect. But under the same circumstances, if there is no gift over, then the condition is regarded as inserted only *in terrorem;* it has no effect, and the legacy continues to be absolute even though it be

which has been developed is a partial compromise between the technical common law rules concerning conditions, and the doctrines of the Roman law which made void all attempts to restrict the perfect freedom of marriage; and like most compromises it

broken. Lloyd v. Branton, 3 Meriv. 108, 117; Marples v. Bainbridge, 1 Madd. 590; Garret v. Pritty, 2 Vern. 293; Wheeler v. Bingham, 3 Atk. 364; Waters v. Tazewell, 9 Md. 291; Maddox v. Maddox, 11 Gratt. 804; Hoopes v. Dundas, 10 Barr. 75; McIlvaine v. Gethen, 3 Whart. 575; Cornell v. Lovett, 11 Casey, 100; Hotz's Estate, 2 Wright, 422. In the case *In re* Dickson's Trusts, 1 Sim. N. S. 37, 43, 44, Lord Cranworth, in a very able opinion, expressed a strong dislike for the notion of a condition being regarded as *in terrorem*. Where the condition annexed to a bequest of personal estate is *precedent*, and general in its restraint, it is absolutely void, and the legacy takes effect notwithstanding its breach. Morley v. Rennoldson, 2 Hare, 570, 579. Where the condition is precedent, and partial and reasonable, and there is a gift over, then on its breach the first legacy does not vest, and the gift over takes effect. Where the condition is *precedent*, and partial and reasonable, and there is no gift over. a few cases hold that the result is exactly the same as with conditions subsequent under like circumstances—namely, that it is merely *in terrorem* and inoperative. Reynish v. Martin, 3 Atk. 330; Keily v. Monck, 3 Ridgw. 205, 263; Malcolm v. O'Callaghan, 2 Madd, 349, 353. It is now settled, however, that such a condition is operative, and if broken the legacy does not vest whether there is a gift over or not. Younge v. Furse, 8 De G. M. & G. 756; Clifford v. Beaumont, 4 Russ. 325; Clarke v. Parker, 19 Ves. 1, 13; Knight v. Cameron, 14 Id. 389; Hemmings v. Munckley, 1 Bro. Ch. 303; and see 2 Eq. Lead. Cas. 480–482.

Conditions restraining marriage by widows.—Conditions annexed to devises and legacies restraining the testator's widow from marrying, have generally been pronounced valid and operative. Lloyd v. Lloyd, 2 Sim. N. S. 255; Grace v. Webb, 15 Sim. 384; Poole v. Bott, 11 Hare, 33; Shewell v. Dwarris, Johns. 172; Craven v. Brady, L. R., 4 Eq. 209; Parsons v. Winslow, 6 Mass. 169; Phillips v. Medbury, 7 Conn. 568; Chapin v. Marvin, 12 Wend. 538; Stroud v. Bailey, 3 Grant's Cas. 310; Commonwealth v. Stauffer, 10 Barr. 350; McCullough's Appeal, 12 Pa. St. 197; Hoopes v. Dundas, 10 Barr. 75; Bennett v. Robinson, 10 Watts. 348; Binnerman v. Weaver, 8 Md. 517; Gough v. Manning, 26 Id. 347; O'Neale v. Ward, 3 Har. & McH. 93; Collier v. Slaughter, 20 Ala. 263; Vance v. Campbell's Heirs, 1 Dana, 229; Holmes v. Field, 12 Ill. 424. When the gift is not upon condition, but the devise or legacy is limited to be during widowhood, or until she marries, the disposition is generally held to be valid. Beekman v. Hudson, 20 Wend. 53; Hotz's Estate, 2 Wright, 422; Cornell v. Lovett, 11 Casey, 100; Mitchell v. Mitchell, 18 Md. 405; 29 Id. 581; Pringle v. Dunkley, 14 Sm. & Mar. 16; Hughes v. Boyd, 2 Sneed, 512; and see American cases *supra*. In some cases, however, a condition subsequent in restraint of marriage by a widow, where there was no gift over, has been held merely *in terrorem;* see Parsons v. Winslow, 6 Mass. 169; Hoopes v. Dundas, 10 Barr. 75; McIlvaine v. Gethen, 3 Whart. 575; Mack v. Mulcahy, 47 Ind. 68. A condition in restraint of the marriage of the widow of another person, not of the testator, has been held operative. Newton v. Marsden, 2 J. & H. 356; Allen v. Jackson, L. R., 1 Ch. D. 399. It has also been held that a condition in restraint of the second marriage of a man—the husband of the testator's niece—is valid. Allen v. Jackson, L. R., 1 Ch. D. 399, reversing S. C., L. R., 19 Eq. 631.

Limitations as distinguished from conditions.—It appears to be the tendency of the English cases to draw a material distinction between conditions in restraint of marriage annexed to testamentay dispositions, and restraints on marriage contained in the very terms of the limitation of the estate given, and to hold such limitations valid although the restraint if imposed in the form of a condition might be void. See this question fully discussed in the English editor's note to Scott v. Tyler, 2 Eq. Lead. Cas. 483–485; Evans v. Rosser, 2 Hem.

has some incongruous features. If a condition is precedent and annexed to a gift of land, it operates as at the common law; when broken, it prevents the estate from vesting, whatever be its nature; when annexed to a gift of personal property, if general or unreasonable, it is wholly void and the gift takes effect; if partial and reasonable, it is operative. When a condition is subsequent and annexed to a gift of land, if general, it is void, and although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* merely, and is inoperative. It seems to be settled by an overwhelming weight of authority, that limitations and conditions, precedent or subsequent, tending to restrain the second marriage of women, are valid, and by the most recent decisions the same rule has been applied to the second marriages of men. Where a partial and reasonable condition has been imposed requiring the consent of certain persons to the marriage of a donee, courts of equity are very liberal in construing the provision so that the gift shall not be defeated by a mere *formal* omission. Where the consent of three

& Mil. 190; Morley v. Rennoldson, 2 Hare, 570, 580; Heath v. Lewis, 3 De G. M. & G. 954; Webb v. Grace, 2 Phil. 701; Potter v. Richards, 1 Jur. N. S. 462; Little v. Birdwell, 21 Tex. 597; Hotz's Estate, 2 Wright, 422; see *per contra* Otis v. Prince, 10 Gray, 581. In my opinion this theory, as maintained by the English courts, is directly opposed to the spirit of equity jurisprudence. Undoubtedly the common law rules are well settled which establish a distinction between a *limitation* and a *condition* subsequent. If land is devised to a widow "for and during her widowhood, and if she marries," then over; and in another case land is devised to a widow "for and during her natural life, but if she marries," then over; at the common law the nature and operation of these two dispositions are quite different. These rules belong to the law of conveyancing, of future and expectant estates, of contingent remainders and conditional limitations; they are in the highest degree arbitrary and technical. To adopt them and apply them in equity, for the purpose of determining the validity of restraints imposed upon marriage, and especially in bequests of personal property, seems to violate the spirit of equity jurisprudence in dealing with kindred questions. It is the settled and familiar policy of courts of equity, except when they are prevented by some compulsory legal dogma, to disregard the *mere form* in which the intention of parties is expressed, to ascertain that intention as correctly as possible, and then to carry out the actual intention unrestricted by technical rules which relate solely to external form. If it is considered that the common law doctrines concerning limitations and conditions in dispositions of real estate are too firmly established to be disregarded, there is certainly no necessity for extending those rules to dispositions of personal property. Such a course of decision is not only unnecessary, it is improper; for it tends to subvert some of the fundamental principles of equity.

trustees or guardians is requisite, the consent of two without consulting the third is insufficient; but if one of the three has renounced, or has never acted, his consent is unnecessary. Where the consent of three is required, and one of them dies, the action of the other two becomes valid. And generally, "where the condition has become impossible by the person dying whose consent was necessary before marriage, it is an excuse."[1] Where the required consent has been refused, and the refusal is alleged to be fraudulent, or to be the result of any vicious, corrupt, or unreasonable cause or motive, a court of equity will examine into the matter, and if the fact is clearly established, it will grant relief; the court will not suffer the gift to be defeated by *such* a breach of the condition.[2]

§ 934. **C. Contracts Directly Belonging to and Affecting Business Relations.**—It has been the policy of the law to promote the freedom of engaging in and carrying on all kinds of business which are beneficial to the public, and to maintain fairness and honesty *towards the public* in all business transaction. The monopolies which were so frequent in the early periods of English history, resulted in most instances from the exercise of the royal prerogative or from legislation. The common law and equity would prevent, as far as possible, all contrivances and means by which the public would be deprived of the skill, industry, or economic and productive labor of individual citizens, or by which the public would be deceived in business dealings. The following are the important applications of the principle: Contracts in restraint of trade.—Contracts in general restraint of trade, whatever be their form or the nature and immediate object of their stipulations, are void at law as well as in equity. The term "general" is not synonymous with "universal." The criterion is the *unreasonableness* of the restraint; and this is always a matter of law to be determined by the court. This unreasonableness may be and often is in respect to the amount of territory over which the restriction extends; or it may be in respect alone to the number of persons with whom the trading is debarred; or in respect to the duration

[1] Clarke v. Parker, 19 Ves. 1, 15, 16; Worthington v. Evans, 1 S. & S. 165; Graydon v. Hicks, 2 Atk. 16; Aislabie v. Rice, 3 Madd. 256; Peyton v. Bury, 2 P. Wms. 626; Grant v. Dyer, 2 Dow, 93; Collett v. Collett, 35 Beav. 312, 315.

[2] Dashwood v. Lord Bulkeley, 10 Ves. 230, 245; Clarke v. Parker, 19 Id. 1, 18. Generally, however, and in the first instance, the person is not obliged to assign his reason for his refusal to consent. Clarke v. Parker, 19 Ves. 1, 22, *per* Lord Eldon. The English decisions concerning consent under these circumstances are very numerous. The questions are fully discussed in the English editor's note to Scott v. Tyler, 2 Eq. Lead. Cas. 486–493.

of the restraint. Where the agreement is thus void, a court of equity may always exercise its jurisdiction defensively by defeating a suit brought for the enforcement of the contract; or affirmatively by granting the remedy of cancellation or of injunction when the defensive remedy at law would not be certain, complete, and adequate.[1] On the other hand, contracts in

[1] Since the illegality does not depend upon the form of the agreement, it is impossible to describe the kinds of contracts which might operate in a general restraint of trade within the principle. The simplest and ordinary species is a contract between A. and B., whereby A. agrees not to carry on a trade within a specified territory. The principle extends to combinations among workmen for the purpose of forcing a higher rate of wages from employers, by preventing others from working or being employed, etc.; analogous combinations and agreements among employers for the purpose of forcing a lower rate of wages, by stipulating not to carry on their business, etc.; combinations and agreements by parties engaged in the same business to enhance prices by compelling the public to deal with themselves, and preventing it from trading with others who are engaged in the same employment; combinations by two or more parties in the same business, to prevent other persons from carrying on the business, and thus to create a monopoly for themselves; similar combinations and agreements between several parties, for the purpose of preventing some of them from engaging in the business, so that the other might secure a monopoly; combinations by several parties to enhance the price of an article by temporarily withdrawing it from the market and preventing any dealing with it by the public in open market, often called "making a corner;" combinations and agreements between persons engaged in the same business for the express purpose of destroying competition, and thus defeating the natural results of economic laws when left to their free operation. This last species of agreement, so common at the present day, and which is doing much to overthrow the entire system of economic science, in my opinion, falls directly within the operation of the general principle; more than any other kind, perhaps, it tends to defeat the freedom of trade which the principle protects. The following cases are illustrations: Mitchel v. Reynolds, 1 P. Wms. 181; 1 Smith's Lead. Cas. 705 (the leading case in which the doctrine is carefully discussed and the previous authorities are cited); Morris v. Colman, 18 Ves. 436; Bryson v. Whitehead, 1 S. & S. 74; Kimberley v. Jennings, 6 Sim. 340; Kemble v. Kean, Id. 333; Harms v. Parsons, 32 Beav. 328; Benwell v. Inns, 24 Id. 307; Whittaker v. Howe, 3 Id. 383; Allsopp v. Wheatcroft, L. R., 15 Eq. 59; Rigby v. Connol, Id., 14 Ch. D. 482; Oregon etc. Co. v. Winsor, 20 Wall. 64; Alger v. Thacher, 19 Pick. 51; Bowen v. Matheson, 14 Allen, 499; Taylor v. Blanchard, 13 Id. 370; Carew v. Rutherford, 106 Mass. 1; Sampson v. Shaw, 101 Id. 145; Boutelle v. Smith, 116 Id. 111; Lawrence v. Kidder, 10 Barb. 641, 653; Stanton v. Allen, 5 Denio, 434; Brewer v. Marshall, 19 N. J. Eq. 537; Morris Run etc. Co. v. Barclay C. Co., 68 Pa. St. 173; Keeler v. Taylor, 53 Id. 467; Crawford v. Wick, 18 Ohio St. 190; Maguire v. Smock, 42 Ind. 1; Gale v. Kalamazoo, 23 Mich. 344; Long v. Towl, 42 Mo. 545; Callahan v. Donnolly, 45 Cal. 152; More v. Bonnet, 40 Id. 251; Wright v. Rider, 36 Id. 342; Rigby v. Connol, L. R., 14 Ch. D. 482, 491 ("trades unions" held to be illegal at the common law, and still illegal except so far as their provisions and rules had been *expressly* authorized by statute); Sampson v. Shaw, 101 Mass. 145 (an agreement to "make a corner" in stocks held illegal); Central etc. Co. v. Guthrie, 35 Ohio St. 666 (an agreement by a voluntary association of salt manufacturers that no member should sell salt except on certain conditions, void); Dethlefs v. Tamsen, 7 Daly, 354; Wiggins Ferry Co. v. Chicago etc. R. R., 5 Mo. App. 347 (contract between common carriers to refuse shippers advantages of improvements or new facilities for transportation, void); Arnot v. Pittston etc. Co., 68 N. Y. 558 (an agreement between two coal mining companies that one should take all the other should mine, and that the latter should not sell to

partial restraint of trade are valid. To this end, they must be partial with respect to the territory included; reasonable with respect to the amount of territory, the circumstances and rights of the party burdened and the one benefited by the restriction, and the number and interests of the public whose freedom of trading is circumscribed; and made upon a valuable and sufficient consideration. The jurisdiction of equity is generally exercised, in respect to these contracts, for the purpose of indirectly compelling their specific performance, by means of an injunction preventing their violation.[1] Interfering with bidding at auctions.—Where property is to be sold at public auction, and especially where the sale is by order of a court, or is made in the course of governmental administration, a secret combination and agreement among persons interested in bidding, whereby they stipulate to refrain from bidding in order to prevent competition and to lower the selling price of the property, is

any third persons, void); Craft v. McConoughy, 79 Ill. 346 (a contract between several grain dealers for the purpose of forming a secret combination to control the price of grain, the cost of storage, and the expense of shipment, void).

[1] Mitchel v. Reynolds, 1 Smith's Lead. Cas. 705, and notes. Such contracts are frequently made in connection with a sale of a business and good-will, the vendor stipulating that he will not carry on the same business within a specified distance from the old place, or for a specified time, or will not solicit the old customers for their trade, and the like. These kinds of stipulations if reasonable as to territory and time will be enforced against the vendor, often by an injunction. Catt v. Tourle, L. R., 4 Ch. 654; Harms v. Parsons, 32 Beav. 328; Leather Cloth Co. v. Lorsont, L. R., 9 Eq. 345; Carter v. Williams, Id., 9 Eq. 678; Gravely v. Barnard, Id., 18 Eq. 518; Altman v. Royal etc. Co., Id., 3 Ch. D. 228; Ginesi v. Cooper, Id., 14 Ch. D. 596; Rousillon v. Rousillon, Id., 14 Ch. D. 351; Leggott v. Barrett, Id., 15 Ch. D. 306 (soliciting old customers restrained); Perkins v. Clay, 54 N. H. 518; Dean v. Emerson, 102 Mass. 480; Morse etc. Co. v. Morse, 103 Id. 73; Taylor v. Blanchard, 13 Allen, 370; Gilman v. Dwight, 13 Gray, 356; McClurg's Appeal, 58 Pa. St. 51; Keeler v. Taylor, 53 Id. 467; Gillis v. Hall, 2 Brews. 342; Warfield v. Booth, 33 Md. 63; Guerand v. Dandelet, 32 Id. 561; Lange v. Werk, 2 Ohio St. 519; Hubbard v. Miller, 27 Mich. 15; Lightner v. Menzel, 35 Cal. 452; Schwalm v. Holmes, 49 Id. 665; Cal. Nav. Co. v. Wright, 6 Id. 258; Smalley v. Greene, 52 Iowa, 241 (contract not to engage in law business in a certain town, valid); Dethlefs v. Tamsen, 7 Daly, 354 (sale of a good-will and agreement not to carry on a competing business); Hedge v. Lowe, 47 Iowa, 137 (sale of a business and good-will and contract not to engage in the same business in a certain town, for a certain time, valid); Goodman v. Henderson, 58 Ga. 567 (agreement to withdraw from the purchasing of hides in a particular market, valid); Curtis v. Gokey, 68 N. Y. 300 (agreement by a retiring partner not to engage in the business at the place for a certain time, or so long as the other shall continue the business, valid); Ellis v. Jones, 56 Ga. 504 (a contract not to carry on a certain trade within a specified town, will be enforced). Analogous to the sale of a good-will, is the sale of a trade secret, or secret recipe or process of manufacture, with an agreement by the vendor not to use the secret in his business, or not to make or vend articles by its means, and the like. Such a contract will be enforced by enjoining its violation. Bryson v. Whitehead, 1 S. & S. 74; Benwell v. Inns, 24 Beav. 307; Peabody v. Norfolk, 98 Mass. 452; Vickery v. Welch, 19 Pick. 523.

illegal according to the uniform course of decision in this country. The stipulations of the buyer to pay compensation to the others in consideration of their promise not to bid, or to share the property with them, are void, and the sale itself, made as the result of the combination, is also tainted with the frauds, and will be set aside at the suit of the vendor.[1] Where, in pursuance of its general policy of letting contracts for public works or for supplies to the lowest bidder, the governmental officers issue proposals for bids, a secret combination and agreement among contractors to refrain from bidding and to prevent competition, falls under the same rule and is equally illegal.[2]

Employment of puffers.—The secret employment by the vendor of one or more persons—called "puffers"—to make fictitious and collusive bids at an auction, and thus to enhance the price by an apparent competition, is clearly a wrong against the *bona fide* bidders and against the one who finally becomes the purchaser. Whether it is absolutely illegal has given rise to a conflict of decision between the courts of law and of equity; and strangely enough the courts of law have been more equitable, more strict in maintaining good faith, than those of equity. A vendor can always protect himself against sacrifice by announcing, as one of the conditions of the sale, that he reserves the right to start the bidding by naming an "up set" price as the minimum, or the right to bid generally, or the right to with-

[1] The English courts are said to have taken a different view and to have held such a transaction valid. Galton Emuss, 1 Coll. 243; *In re* Carew's Estate, 26 Beav. 187. The rule established by the American courts is certainly a reasonable and just one. A secret combination as described is intrinsically much worse than the employment of "puffers" by the vendor. Jones v. Caswell, 3 Johns. Cas. 29; Doolin v. Ward, 6 Johns. 194; Troup v. Wood, 4 Johns. Ch. 228; Hawley v. Cramer, 4 Cow. 717; Brisbane v. Adams, 3 N. Y. 129; Gardiner v. Morse, 25 Me. 140; Gulick v. Ward, 5 Halst. 87; Hamilton v. Hamilton, 2 Rich. Eq. 355; Johnston v. La Motte, 6 Id. 347; Grant v. Lloyd, 12 Sm. & Mar. 191; Newman v. Meek, 1 Freem. Ch. 441; Dudley v. Little, 2 Ohio, 508; Plaster v. Burger, 5 Ind. 232; Wooton v. Hinkle, 20 Mo. 290; Piatt v. Oliver, 2 McLean, 267; Cocks v. Izard, 7 Wall. 559; Slater v. Maxwell, 6 Id. 268; Trist v. Child, 21 Id. 441. In connection with this rule, there are decisions which hold that a mere agreement of persons interested in the bidding, for the purpose of having them all share in the property when bid off by one of their number, and not for the purpose of preventing competition, is not open to the objection of illegality, but is valid. This is probably all that the English courts meant to decide in the cases cited *supra*. Kearney v. Taylor, 15 How. (U. S.) 494; Phippen v. Stickney, 3 Met. 384, 387; Goode v. Hawkins, 2 Dev. Eq. 393; Nat. B'k of the Metropolis v. Sprague, 20 N. J. Eq. 159.

[2] In such a case, the stipulations among the parties to the arrangement for compensation to those who withhold their bids, or for a share in the contract when awarded, are clearly void; and the contract itself awarded by means of such combination might be set aside. Weld v. Lancaster, 56 Me. 453; Atcheson v. Mallon, 43 N. Y. 147; People v. Stephens, 71 Id. 527; Stevens v. Perrier, 12 Kans. 297; Swan v. Chorpenning, 20 Cal. 182; and cases in last note.

draw the property. In regard to puffing, two cases may arise: (1) Where the sale is made without any preliminary announcement at all; (2) Where it is announced to be without reserve. In the first case, the rule is settled at law that *any* puffing, the employment of even one puffer, is illegal and renders the sale voidable at the option of the purchaser.[1] Courts of equity, in this case, allowed *one* puffer; in other words, puffing to the extent of one fictitious bidder did not render the sale voidable.[2] If the vendor transgressed this limit and employed more than one puffer, the transaction became illegal at equity as well as at law; the fictitious competition was a fraud upon the *bona fide* bidders, which rendered the sale voidable.[3] In the second place, where an announcement is made that "the sale will be without reserve," or words to that effect, this is a pledge by the vendor that the competition shall be absolutely free; the employment of any puffing—one or more puffers—renders the sale voidable in equity as well as at law, and of course defeats a specific performance.[4] The subject is now regulated in England by a recent statute.[5] Fraudulent trade-marks.—Another illustration of frauds upon the public in business dealings con-

[1] Thornett v. Haines, 15 M. & W. 367, 372, *per* Parke, B.; Crowder v. Austin, 3 Bing. 368; Fuller v. Abrahams, 3 Brod. & B. 116; 6 Moore, 316; Green v. Baverstock, 14 C. B. N. S. 204; Howard v. Castle, 6 T. R., 642; Bexwell v. Christie, Cowp. 395; Towle v. Leavitt, 23 N. H. 360; Trust v. Delaplaine, 3 E. D. Smith, 219; Staines v. Shore, 16 Pa. St. 200; Faucett v. Currier, 115 Mass. 20; Williams v. Bradley, 7 Heisk. 54. This rule is approved by Chan. Kent in 2 Com. 538, 539 (5th ed.)

[2] Although this rule was settled, it has been applied very reluctantly in recent decisions, and the tendency is evident both in England and in the United States to bring the equity rule into an agreement with the legal one, even in the absence of any statute. Bramley v. Alt, 3 Ves. 620; Smith v. Clarke, 12 Id. 477; Woodward v. Miller, 2 Coll. 279; Flint v. Woodin, 9 Hare, 618; Woods v. Hall, 1 Dev. Eq. 415.

[3] Thornett v. Haines, 15 M. & W. 367, 372, *per* Parke, B.; Bramley v. Alt, 3 Ves. 620; Conolly v. Parsons, cited 3 Id 625; Smith v. Clarke, 12 Id. 477; Woodward v. Miller, 2 Coll. 279; Flint v. Woodin, 9 Hare, 618; Meadows v. Tanner, 5 Madd. 34; Robinson v. Wall, 10 Beav. 61; 2 Phil. 372; Mortimer v. Bell, L. R., 1 Ch. 10; Dimmock v. Hallett, Id., 2 Ch. 21; Wood v. Hall, 1 Dev. Eq. 415; Morehead v. Hunt, 1 Dev. Eq. 35; Nat. B'k of Metropolis v. Sprague, 20 N. J. Eq. 159; Davis v. Petway, 3 Head, 667; Williams v. Bradley, 7 Heisk. 54; Wicker v. Hoppock, 6 Wall. 94; Veazie v. Williams, 8 How. (U. S.) 134; 3 Story, 611, 622. It is probable that most American courts of equity would *now* disregard this distinction between one puffer and more than one.

[4] Thornett v. Haines, 15 M. & W. 367 and cases cited; Robinson v. Wall, 2 Phil. 372, 375, *per* Lord Cottenham; Meadows v. Tanner, 5 Madd. 34; Mortimer v. Bell, L. R., 1 Ch. 10; Dimmock v. Hallett, Id., 2 Ch. 21; Gilliat v. Gilliat, Id., 9 Eq. 60; Veazie v. Williams, 8 How. (U. S.) 134; 3 Story, 611, 622.

[5] 30 and 31 Vict., ch. 48. This statute recites that different rules have prevailed in law and equity, and that the same rule should regulate both jurisdictions. It makes the employment of puffing unlawful in every case, unless the right to do so has been expressly reserved. See Gilliat v. Gilliat, L. R., 9 Eq. 60.

sists in the use of fraudulent trade-marks. The whole doctrine of infringement of trade-marks is based upon the notion of misleading the public; but this phase of the subject I do not at present touch upon. The fraud now referred to is that of the original proprietor of the trade-mark, whose alleged right is invaded by an infringer, and who seeks the protection of courts. If a trade-mark contains a falsehood on its face, deceiving the public, and giving the goods a character and reputation which they do not possess nor deserve; or if the business of the proprietor is itself illegal, or is knowingly carried on by him in a false and deceptive manner, the trade-mark is in fact a fraud upon the public; no protection will be given to the proprietor against an infringement. It is added, however, that a false representation by the proprietor, as to a matter wholly collateral to his trade-mark, does not affect his right to a remedy either in equity or at law.[1] Contracts opposed to the policy of some statute prescribing modes of certain business dealings.[2] Contracts of trading will alien enemies.[3]

§ 935. **D. Contracts Affecting Public Relations.**—Contracts made for the purpose of unduly controlling or affecting official conduct, or the exercise of legislative, administrative, and judicial functions, are plainly opposed to public policy. They strike at the very foundations of government, and tend to

[1] Leather Cloth Co. v. American Leather etc. Co., 11 H. L. Cas. 523, 542; Pidding v. How, 8 Sim. 477; Perry v. Truefitt, 6 Beav. 66; Flavel v. Harrison, 10 Hare, 467; Marshall v. Ross, L. R., 8 Eq. 651; Lee v. Haley, Id., 5 Ch. 155, 158; Ford v. Foster, Id., 7 Ch. 611; Singer Mfg. Co. v. Wilson, Id., 2 Ch. D. 434; Siegert v. Findlater, Id., 7 Ch. D. 801; Orr v. Johnston, Id., 13 Ch. D. 434; Civil Service etc. Co. v. Dean, Id., 13 Ch. D. 512; Boulnois v. Peake, Id., 13 Ch. D. 513, n.; Fetridge v. Wells, 4 Abb. Pr. 144; 13 How. Pr. 385; Curtis v. Bryan, 2 Daly, 312, 317; Palmer v. Harris, 60 Pa. St. 156; Heath v. Wright, 3 Wall. Jr. 141.

[2] These cases depend each upon their own circumstances. Such statutes often prescribe the kinds of business which can be transacted by monetary corporations and associations, the methods of transacting, etc. *In re* Arthur Average Assoc., L. R., 10 Ch. 542. *In re* South Wales etc. Co., Id., 2 Ch. D. 763; Sykes v. Beadon, Id., 11 Ch. D. 170, 183, 197; Smith v. Anderson, Id., 15 Ch. D. 247 (overruling Sykes v. Beadon on one point); Rigby v. Connol, Id., 14 Ch. D. 482, 491; Johnson v. Shrewsbury etc. Ry., 3 De G. M. & G. 914, *per* Knight Bruce, L. J.; Aubin v. Holt, 2 K. & J. 66, 70; Carey v. Smith, 11 Ga. 539, 547; Kelly v. Devlin, 58 How. Pr. 487; Clarke v. Omaha etc. R. R., 5 Neb. 314; Christian Union v. Yount, 11 Otto, 352; Oscanyan v. Winchester etc. Co., 15 Blatch. C. C. 79.

[3] Seaman v. Waddington, 16 Johns. 510, opinion of Ch. Kent and authorities cited by him; Clements v. Yturria, 81 N. Y. 285; Robinson v. Internat. Life Ins. Co., 42 Id. 54, 66; Woods v. Wilder, 43 Id. 164; Bank of N. O. v. Matthews, 49 Id. 12; Clements v. Graham, 24 La. An. 446; Hanauer v. Doane, 12 Wall. 342; Hanauer v. Woodruff, 15 Id. 439; Montgomery v. U. S., 15 Id. 395; U. S. v. Grossmayer, 9 Id. 72; The Ouachita Cotton, 6 Id. 521; Sprott v. U. S., 20 Id. 459; U. S. v. Lapene, 17 Id. 602; Carlisle v. U. S., 16 Id. 147, 151; U. S. v. Huckabee, 16 Id. 414; Titus v. U. S., 20 Id. 475; Desmare v. U. S., 3 Otto, 605; Whitfield v. U. S., 2 Otto, 165.

destroy that confidence in the integrity and discretion of public official action which is essential to the preservation of civilized society. The principle is universal, and is applied without any reference to the *mere* outward form and alleged purpose of the transaction. If a contract does unduly interfere with governmental functions, or with the relations of the citizen towards his own government in any of its departments, whether the interference be direct or indirect, such agreement is illegal whatever form it may have assumed. It is impossible, therefore, to mention all the instances which properly come within this principle; the following are some of the most important species: Contracts for the procurement of office.—All agreements which interfere with the integrity, discretion, or freedom of the electing or appointing power, are illegal.[1] Contracts interfering with legislative proceedings.—Where a private statute, or a statute directly affecting private rights, is pending before the legislature, a secret agreement between parties interested, which if disclosed might have determined the action of the legislature—as for example an agreement by one party to withdraw his opposition in consideration of a compensation to be paid by the other—has been held a fraud upon legislation and therefore void.[2] The doctrine finds its most important application in

[1] This group contains many varieties; contracts directly with the appointing power, for the purpose of obtaining the office by means of any reward, compensation, or consideration; contracts by which the applicant agrees to pay compensation to another, or to share the emoluments with him, in consideration of his procuring the office; contracts between opposing candidates, by which in consideration that one withdraws, or aids the other, the latter stipulates to pay a compensation, or to share the emoluments. The form is immaterial wherever the purpose is to procure an office by private interference with the freedom and integrity of the appointing body. The principle applies to private offices in corporations, etc., as well as to public governmental offices. Hartwell v. Hartwell, 4 Ves. 811; Wallis v. Duke of Portland, 3 Id. 494; Stevens v. Bagwell, 15 Id. 139; Osborne v. Williams, 18 Id. 379; Law v. Law, 3 P. Wms. 391; Cas. temp. Talb. 140; Morris v. MacCullock, 2 Eden, 190; Hanington v. Du Chatel, 1 Bro. Ch. 124; Boynton v. Hubbard, 7 Mass. 112, 119; Ferris v. Adams, 23 Vt. 130; Becker v. Ten Eyck, 6 Paige, 68; Hunter v. Nolf, 71 Pa. St. 282; Meguire v. Corwine, 11 Otto, 108 (contract by which A. agrees to procure B.'s appointment as counsel in certain suits against the United States, and B. agrees to give A. half of the fee obtained, held void); Hager v. Catlin, 18 Hun, 448; Gaston v. Drake, 14 Nev. 175 (agreement to share the salary of a public office in consideration that one party shall use his influence to secure the other's election, void); Reed v. Peper etc. Co., 2 Mo. App. 82 (agreement by which A. was to receive part of the salary of certain officers, in consideration of his forbearing to use his influence and efforts to procure a repeal of the statute creating the offices, void); Guernsey v. Cook, 120 Mass. 501 (contract for the sale of stock for the purpose of procuring one of the parties to be elected treasurer of the corporation illegal).

[2] The most recent English decisions, however, have modified this conclusion, by requiring not merely a secret agreement, but one which it was the duty of the parties to disclose to the legislature. Vauxhall B'dge Co. v.

dealing with contracts for the purpose of *procuring* legislation. All agreements, in every possible form, for the purpose of securing or using private and personal *influence* with members of a legislature, or of securing or using *labor and services* with legislators privately, personally, and individually, for the object of obtaining legislation either public or private, are in the highest degree contrary to the fundamental theory of free legislative action.[1] Contracts interfering with executive proceedings.—These are subject to the same general rules which apply to similar agreements concerning legislation. All agreements, whether made with officials or with third persons, which directly or indirectly control or interfere with the due exercise of executive and administrative functions as prescribed or regulated by law, are clearly illegal.[2] Contracts interfering with

Earl Spencer, 2 Madd. 356; Jac. 64; Simpson v. Lord Howden, 1 Keen, 583; 3 My. & Cr. 97; 9 Cl. & Fin. 61; 10 A. & E. 793; Earl of Shrewsbury v. North Staffordshire R'y, L. R., 1 Eq. 593; and see Mangles v. Grand Dock C. Co., 10 Sim. 519. It has been held that where a statute has been procured by actual fraud upon the legislature, equity may relieve, not by setting aside the statute or declaring it void, but by depriving the wrongdoers of the advantages acquired thereby, treating them as trustees, etc. This doctrine must, I think, be confined within very narrow limits. See Williamson v. Williamson, 3 Sm. & Mar. 715; State v. Reed, 4 H. & McH. 6.

[1] Our law permits a private citizen to endeavor to influence a legislature and to obtain the enactment of a statute, in an open public manner, by arguments directed to the whole body or to a committee, in the same manner as arguments are presented to a court by counsel. To this end, agreements for the employment of an agent or attorney, upon a compensation, to argue before the legislature or its committees, or to collect facts, reasons, etc., and present them openly to all the legislature or to its proper committees, are valid. Agreements which go beyond this line, and stipulate for private services to be rendered by dealing with individual legislators privately and personally, have been uniformly condemned by courts of the highest authority. The varieties of such agreements are very numerous; the following cases furnish illustrations: Edward v. Grand Junc. Ry., 1 My. & Cr. 650; Marshall v. Balt. & O. R. R., 16 How. (U. S.) 314 (a leading case; the opinion of Grier, J., is an able discussion of the doctrine); Frost v. Inhab. of Belmont, 6 Allen, 152; Sedgwick v. Stanton, 14 N. Y. 289; Nickelson v. Wilson, 60 Id. 362; Mills v. Mills, 40 Id. 543; Rose v. Truax, 21 Barb. 361; Smith v. Applegate, 3 Zabr. 352; Clippinger v. Hepbaugh, 5 Watts & S. 315; Miles v. Thorne, 38 Cal. 335; Powell v. Maguire, 43 Id. 11; McBratney v. Chandler, 22 Kans. 692 (where the services are partly those of an attorney and partly of a lobbyist, but blended as a single employment, the entire contract is void).

[2] This group includes contracts with officers themselves stipulating for the omission or violation of their official duties, or stipulating for compensation other or greater than the fees provided by law for the erformance of their duties; contracts with third persons stipulating for their influence in procuring administrative acts to be done or omitted, and the like. Cooth v. Jackson, 6 Ves. 12, 31, 35; Methwold v. Walbank, 2 Ves. Sen. 238; Tool Co. v. Norris, 2 Wall. 45; Trist v. Child, 21 Id. 441; Nichols v. Mudgett, 32 Vt. 546; Robinson v. Kalbfleisch, 5 T. & C. 212; Cook v. Freudenthal, 80 N. Y. 202; Hatzfield v. Gulden, 7 Watts, 152; Winpenny v. French, 18 Ohio St. 469; Edwards v. Estell, 48 Cal. 194; Packard v. Bird, 40 Id. 378; Swan v. Chorpenning, 20 Id. 182; Spence v. Harvey, 22 Id. 337; Kelly v. Devlin, 58 How. Pr. 487;

judicial proceedings.—All agreements directly or indirectly preventing or controlling the due administration of justice, are opposed to the universal and most elementary principles of public policy. Whatever be their form and immediate purpose, and however innocent may be the motives of the parties, they are plainly invalid.[1]

§ 936. **3. Contracts Opposed to Good Morals.**—It is unnecessary to discuss the meaning of the phrase *contra bonos mores*, since the doctrine is familiar. It is enough to say that all agreements in which the consideration past or future, or the executory terms stipulating for acts to be done or omitted, are contrary to good morals, are illegal and void in equity, and with a very few exceptions at the common law. This doctrine

Macon v. Huff, 60 Ga. 221; Berryman v. Cincinnati etc. R'y, 14 Bush. 755 (contract with an officer of a railroad company to use his influence to procure the railroad to be located in a particular place, void); St. Louis v. St. Louis etc. Co., 5 Mo. App. 484 (an agreement by a corporation not to exercise a portion of the franchises granted to it for public purposes, is invalid); Western U. T. Co. v. Chicago etc. R. R., 86 Ill. 246; West. U. T. Co. v. Atlantic etc. T. Co., 7 Biss. 367 (contracts between a railroad and telegraph company giving exclusive right of way and of use, are valid); Denison v. Crawford Co., 48 Iowa, 211 (agreement between a county and its agent for special services and compensation, held valid); Reed v. Peper etc. Co., 2 Mo. App. 82; Stanton v. Embrey, 3 Otto, 548 (an agreement to pay counsel a contingent fee for legitimate professional services in prosecuting a claim against the United States, is valid); Fowler v. Donovan, 79 Ill. 310 (an agreement between several persons to contribute and pay for a substitute for such of them as should be drafted into the United States military service, is valid); Marsh v. Russell, 66 N. Y. 288; Caton v. Stewart, 76 N. C. 357; Ashburner v. Parrish, 81 Pa. St. 52; and see cases of contracts made *colore officii* in the next following note.

[1] Under this head are included agreements with judicial officers relating to and controlling their judicial action; with third persons stipulating for their personal influence in procuring judicial action; contracts to remove witnesses, or in any manner to prevent them from testifying; or to remove, conceal, suppress, or in any way prevent the production of documentary or other evidence at an expected trial; agreements to procure witnesses *to testify to a certain state of facts;* agreements to indemnify sheriffs and other executive officers of a court for a *willful* violation or neglect of their official duty; and a great variety of others. Ferris v. Adams, 23 Vt. 136; Cook v. Freudenthal, 80 N. Y. 202; Winter v. Kinney, 1 N. Y. 365; Richardson v. Crandall, 48 Id. 348; Barnard v. Viele, 21 Wend. 88; People v. Meighan, 1 Hill, 298 (cases of bonds taken *colore officii*); Dawkins v. Gill, 10 Ala. 206; Odineal v. Barry, 24 Miss. 9; Valentine v. Stewart, 15 Cal. 387, 404, 405, and cases cited; Patterson v. Donner, 48 Id. 369, 379; Speck v. Dausman, 7 Mo. App. 165 (agreement between the parties to a pending divorce suit, held void); Hamilton v. Hamilton, 89 Ill. 349 (ditto); Comstock v. Adams, 23 Kans. 513 (an agreement not to disturb a decree for divorce wrongfully granted, invalid); Bradley v. Coolbaugh, 91 Ill. 148 (a special agreement among the creditors of an absconding debtor, providing for judicial proceedings in the name of one for the benefit of all, held valid); Averbeck v. Hall, 14 Bush, 505 (a contract to endeavor to procure the dismissal of a criminal prosecution, void); Breathwit v. Rogers, 32 Ark. 758; Lindsay v. Smith, 78 N. C. 328; Mahler v. Phœnix Ins. Co., 9 Heisk. 399; Veramendi v. Hutchins, 48 Tex. 531; Laing v. McCall, 50 Vt. 657; Wight v. Rindskopf, 43 Wisc. 344; Ecker v. Bohn, 45 Md. 278; Ecker v. McAllister, 45 Md. 290; Glenn v. Mathews, 44 Tex. 400.

applies in equity whatever be the external form of the contract, or its immediate purpose, or the particular nature of its illegality. Among the most important and familiar illustrations, are the following. Contracts based upon the consideration either past or future of illicit sexual intercourse, or stipulating for such future intercourse, or in any manner promoting or furnishing opportunities for unlawful cohabitation or prostitution.[1] Contracts which constitute or amount to champerty or maintenance, these being highly criminal at the common law.[2] Contracts executed or executory given upon the consideration of, or stipulating for, the compounding a felony, the forbearance to prosecute for a crime, or the abandonment of a pending criminal prosecution.[3]

[1] All contracts providing for future illicit intercourse, and all unsealed contracts upon the consideration of past intercourse, were void at law as well as in equity. On account of the arbitrary effect given to a seal, contracts based upon the consideration of past intercourse, if sealed, were not void at the common law; and this fact furnished an occasion for the exercise of the equitable jurisdiction in canceling such instruments, since there was no defense at law. In most of the states, where the common law effect of the seal has been abrogated, or where a seal is not conclusive evidence of consideration, this technical distinction can no longer exist. Bengon v. Nettlefold, 3 Macn. & G. 94, 102, 103; Batty v. Chester, 5 Beav. 103; Smyth v. Griffin, 13 Sim. 245; Hill v. Spencer, Ambl. 641, 836; Gray v. Mathias, 5 Ves. 286; and cases cited *ante*, § 402, n. (1). In the same class are leases of premises for the purpose of being used as houses of prostitution, or for other known illegal objects. Newby v. Sharpe, L. R., 8 Ch. D. 39; Riley v. Jordan, 122 Mass. 231; Marlatt v. Warwick, 19 N. J. Eq. 439; Cutler v. Tuttle, 19 Id. 549, 562; Sweet v. Tinslar, 52 Barb. 271; D'Wolf v. Pratt, 42 Ill. 198; Smith v. White, L. R., 1 Eq. 626.

[2] The common law rules concerning champerty and maintenance have been greatly modified in the United States, and to a large extent abrogated. Many agreements concerning litigations, legal controversies, and disputed claims, which were condemned by the ancient law, are not only sustained by the modern law of this country, but are of frequent occurrence. The good policy of the change may well be doubted. Many other ancient common law rules, which modern civilization came to regard as merely arbitrary and oppressive, are found by experience, after their abolishment, to have been wise, and based upon the unchangeable facts of human nature. Powell v. Knowler, 2 Atk. 224; Strachan v. Brander, 1 Eden, 303, cited 18 Ves. 127, 128; Stevens v. Bagwell, 15 Ves. 139; Wallis v. Duke of Portland, 3 Id. 494; Reynell v. Sprye, 1 De G. M. & G. 660; Knight v. Bowyer, 2 De G. & J. 421; Strange v. Brennan, 15 Sim. 346; Hilton v. Woods, L. R., 4 Eq. 432; Sprye v. Porter, 7 E. & B. 58; 3 Jur. N. S. 330; Grell v. Levy, 16 C. B. N. S. 73; Earle v. Hopwood, 9 Id. 566; 7 Jur. N. S. 775; Stanton v. Embrey, 3 Otto, 548; Ballard v. Carr, 48 Cal. 74 (agreement giving counsel an interest in or a part of the property to be recovered, as a contingent fee for his services in a litigation, valid); Hoffman v. Vallejo, 45 Id. 564 (ditto); Dorwin v. Smith, 35 Vt. 69; Thurston v. Percival, 1 Pick. 415; Arden v. Patterson, 5 Johns. Ch. 44; Thalimer v. Brinkerhoff, 20 Johns. 386; Slade v. Rhodes, 2 Dev. & Bat. Eq. 24; Holloway v. Lowe, 7 Port. 488; Brown v. Beauchamp, 5 Mon. 413; Bryant v. Hill, 9 Dana, 67; Cardwell v. Sprigg, 7 Id. 36; Wilhite v. Roberts, 4 Id. 172; Coquillard v. Bearss, 21 Ind. 479; Martin v. Veeder, 20 Wisc. 466.

[3] This illegality affects not only the main agreement, but all collateral securities given upon such consideration, such as notes, bonds, mortgages, etc. Johnson v. Ogilby, 3 P. Wms. 277; Shaw v. Reed, 30 Me. 105; Har.

§ 937. **III. Equitable Jurisdiction in Case of Illegal Contracts. Usurious Contracts.**—Equitable relief is granted against usurious contracts whether executory or executed, since from considerations of public policy the two parties are not regarded as standing *in pari delicto*. While the contract is executory, equity will not aid the creditor in enforcing it. If therefore suit is brought upon such an agreement, the borrower may set up the usury as a defense, without paying or offering to pay the amount actually borrowed, or legal interest thereon, and a recovery will be entirely defeated. Equity will never assist a party to carry into effect his own intentional violation of the law.[1] It is well settled that courts of equity will go farther, and will give all the affirmative relief which is just to the borrower. If the contract is executory the borrower may obtain the remedy of a surrender and cancellation of the securities which he has given for the usurious loan.[2] If the contract is executed, he may recover back the usurious amount paid in excess of the sum actually borrowed and legal interest thereon.[3] This affirm-

rington v. Bigelow, 11 Paige, 349; Atwood v. Fisk, 101 Mass. 363; Swartzer v. Gillett, 1 Chand. (Wisc.) 207, 209, 210; Averbeck v. Hall, 14 Bush. 505; Lindsay v. Smith, 78 N. C. 328 (an agreement upon a single consideration to do certain acts, not of themselves illegal, and to stop a criminal prosecution, is wholly void); Laing v. McCall, 50 Vt. 657 (a contract of sale of chattels made in order to prevent a prosecution for forgery is void); Wight v. Rindskopf, 43 Wisc. 344 (an agreement to compromise a criminal case arising under the United States internal revenue laws, will not be enforced in the state courts). As illustrations of somewhat analagous contracts which are not illegal, see Breathwit v. Rogers, 32 Ark. 758 (a promise not to bring a *civil* action for damages on account of a tort which is also a crime, is a valid consideration of a contract, provided no promise is involved not to prosecute or give evidence of the crime); Mahler v. Phœnix Ins. Co., 9 Heisk. 399; Ecker v. Bohn, 45 Md. 278; Ecker v. McAllister, 45 Md. 290.

[1] Mason v. Gardiner, 4 Bro. Ch. 436; Fanning v. Dunham, 5 Johns. Ch. 122; Hart v. Goldsmith, 1 Allen, 145; Smith v. Robinson, 10 Id. 130; Union B'k v. Bell, 14 Ohio St. 200; Sporrer v. Eifler, 1 Heisk. 633, 636; Kukner v. Butler, 11 Iowa, 419; Spain v. Hamilton, 1 Wall. 604. O'Neil v. Cleveland, 30 N. J. Eq. 273 (one of two executors loaned money of the estate on bond and mortgage, reserving usury which he appropriated to his own use; on a foreclosure by the executors on behalf of the estate, held that the usury could be set up as a defense); Powers v. Chaplain, 30 N. J. Eq. 17 (defendant in a foreclosure suit was let in to answer on terms which precluded him from setting up usury as a defense; usury was showed by the evidence; held that the plaintiff could only recover the amount justly and equitably due).

[2] Peters v. Mortimer, 4 Edw. Ch. 279.

[3] Bosanquett v. Dashwood, Cas. temp. Talb. 38, 41; Rawden v. Shadwell, Ambl. 269; Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 144; Davis v. Demming, 12 W. Va. 246; Morrison v. Miller, 46 Iowa, 84; Gantt v. Grindall, 49 Md. 310 (where the usurious interest already paid and the installments of the principal paid, together equal or exceed the amount of the actual loan secured by a usurious mortgage, equity will restrain any suit or proceeding to foreclose the mortgage). See, also, cases cited in the next note. In one or two states, by reason of a statutory requirement, it seems that the borrower can recover back the entire sum which has been

ative interposition of the court is subject, however, to the principle that the plaintiff must himself do equity. It is a firmly settled rule, in the absence of contrary statutes, that where a borrower, who has not already paid the debt, brings a suit for affirmative relief against a usurious contract, he can obtain the remedy only upon the condition of repaying, or offering to repay, the sum which is justly and equitably due to his creditor—the amount actually loaned and legal interest. The absence of such an offer is ground for defeating the suit.[1] Since the illegality of usury is wholly the creature of legislation, the provisions of the statute must furnish the rule determining the extent, limits, and occasion of relief. It results from a just interpretation of the legislation, that the right to complain is a personal one, belonging only to the borrower and his representatives; no other party is entitled to relief defensive or affirmative. The doctrine is, therefore, generally settled, that where land subject to a usurious mortgage is conveyed to a grantee who assumes the payment thereof as a part of the consideration of the conveyance, he can not set up the usury either as a defense to a foreclosure, or as a ground for a cancellation of the security. The same is true of any transferee of property who, as a part of the transaction, assumes payment of a usurious debt. For the same reason a subsequent mortgagee or incumbrancer can not defeat a prior incumbrance or procure it to be set aside upon allegations of its usurious character.[2]

paid, and not merely the usurious excess. Wherever the usurious loan is concealed under the appearance of a pretended sale, equity will look at the real transaction, and give relief by setting aside the sale. Waller v. Dalt, 1 Ch. Cas. 276; 1 Dick. 8; Barny v. Beak, 2 Id. 136; Barker v. Vansommer, 1 Bro. Ch. 149.

[1] Mason v. Gardiner, 4 Bro. Ch. 436; Fanning v. Dunham, 5 Johns. Ch. 122, 142, 143, 144; Rogers v. Rathbun, 1 Id. 367; Williams v. Fitzhugh, 37 N. Y. 444; Ballinger v. Edwards, 4 Ired. Eq. 449; Ware v. Thompson, 2 Beasley, 66; Whitehead v. Peck, 1 Kelly, 140; Noble v. Walker, 32 Ala. 456; Ruddell v. Ambler, 18 Ark. 369; Sporrer v. Eifler, 1 Heisk. 633, 636; Alden v. Diossy, 16 Hun, 311; Purnell v. Vaughan, 82 N. C. 134; Campbell v. Murray, 62 Ga. 86; Pickett v. Merch. Nat. B'k, 32 Ark. 346; Morrison v. Miller, 46 Iowa, 84. The same principle has been applied to a lender seeking to reform a usurious security in a state where the statute only avoided the excess of illegal interest. Corby v. Bean, 44 Mo. 379. In one or two states the statute requires courts of equity to grant affirmative relief to the borrower, without imposing any condition as above described. Bissell v. Kellogg, 60 Barb. 617; and see Cooper v. Tappan, 4 Wisc. 376.

[2] The reasons for these conclusions given by different courts in the following cases, are not always the same; but they are not conflicting. De Wolf v. Johnson, 10 Wheat. 367, 392; Green v. Kemp, 13 Mass. 515, 575; Shufelt v. Shufelt, 9 Paige, 137, 145; Cole v. Savage, 10 Id. 583; Post v. Dart, 8 Id. 639, 641; Morris v. Floyd, 5 Barb. 130; Sands v. Church, 6 N. Y. 347; Merch. Ex. Bank v. Commercial etc. Co., 49 Id. 635, 643; Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137, 150, and cases cited; Barthet v. Elias, 2 Abb. N. C. 364; Spaulding v. Davis, 51 Vt. 77; Citizens' Bk. v. Cook, 61

§ 938. **Gaming Contracts.**—In gaming contracts, unlike usurious loans, it can not be said that one party takes advantage of the necessities of the other, who is *in vinculis;* both act freely and are *in pari delicto;* the general maxims therefore apply. While the contract is still executory, a court of equity will not aid the creditor to enforce it, the illegality being a pertect defense in equity as well as at law.[1] After the agreement has been executed by the loser's payment of the money, or by a conveyance of land or other property, equity will not interfere on his behalf and decree a recovery back of the money paid, or a cancellation of the conveyance or assignment, unless perhaps there were circumstances of fraud, oppression, duress, and the like, in procuring the payment or transfer, which would of themselves be a sufficient ground for equitable interposition distinct from the mere illegality.[2] Finally, as long as the contract is still executory, equity has jurisdiction to aid the losing party by ordering the written agreement and other securities to

Ga. 177; Lee v. Stiger, 30 N. J. Eq. 610; Reed v. Eastman, 50 Vt. 67 (a purchaser of the mortgaged property can not set up the defense). McGuire v. Van Pelt, 55 Ala. 344 (nor an assignee of the mortgagor); Pickett v. Merch. Nat. Bk., 32 Ark. 346 (nor a third person who has assumed the debt); Lamoille Co. N. Bk. v. Bingham, 50 Vt. 105 (nor can a surety avail himself of usury paid by his principal); Ready v. Huebner, 46 Wisc. 692 (a subsequent mortgagee can not set up usury in a prior mortgage as a defense thereto); Bensley v. Homier, 42 Id. 631 (nor can a subsequent judgment creditor). It seems, however, under the statutes of some states that a subsequent mortgagee, when made a defendant in a suit to enforce a prior mortgage given by his mortgagor, may allege usury thereon as a defense; see Union etc. Sav. Inst. v. Clark, 59 How. Pr. 342. In the recent case of Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137, A. gave a usurious mortgage on certain land; he afterwards conveyed the land subject to the mortgage to B., who assumed to pay it as "part of the purchase price of the premises;" B. then conveyed the same land to C., subject to the mortgagee, who in like manner assumed its payment; finally C. reconveyed the land to A., but this conveyance was not subject to the mortgage. The mortgagee brought suit to enforce the mortgage, but asked no relief against B. and C., and made no allegations showing that he had accepted the agreements between A. and them. Held that A. was not debarred from setting up the defense of usury and defeating the action. See, also, Hetfield v. Newton, 3 Sandf. Ch. 564; Hartley v. Harrison, 24 N. Y. 170, 173; Schermerhorn v. Talman, 14 Id. 93; Cope v. Wheeler, 41 Id. 303.

[1] Bosanquett v. Dashwood, Cas. temp. Talb. 38, 41; Adams v. Gay, 19 Vt. 358; Spaulding v. Preston, 21 Id. 9; Adams v. Barrett, 5 Ga. 404; Gotwalt v. Neal, 25 Md. 434; Pope v. Chafee, 14 Rich. Eq. 69; and cases in the two following notes.

[2] There were a few early *dicta* and perhaps decisions opposed to this conclusion; but they have been overruled. Bosanquett v. Dashwood, Cas. temp. Talb. 38, 41; Rawdon v. Shadwell, Ambl. 269; Thomas v. Cronise, 16 Ohio, 54; Cowles v. Raguet, 14 Id. 38, 55; Adams v. Gay, 19 Vt. 358; Spaulding v. Preston, 21 Id. 9; Gotwalt v. Neal, 25 Md. 434; Adams v. Barrett, 5 Ga. 404; Pope v. Chafee, 14 Rich. Eq. 69; Paine v. France, 26 Md. 46; Weakley v. Watkins, 7 Humph. 356, 357; and see Solinger v. Earle, 82 N. Y. 393, 397, 399. Where money is loaned expressly to enable the borrower to pay a gambling debt, it may be recovered back. *Ex parte* Pyke, L. R., 8 Ch. D. 754, 756, 757.

be surrendered up and canceled, and by granting the ancillary remedy of injunction to restrain their negotiation, transfer, or enforcement; and when the circumstances are such that the defensive remedy at law would not be equally certain, complete, and adequate, this jurisdiction ought to be and will be exercised. This conclusion is sustained by the highest authority, and is in perfect accord with principle.[1]

§ 939. **Other Illegal Contracts.**—I have already, in the former volume, stated and illustrated the general rules which determine when relief will or will not be given in cases of ordinary illegal contracts. Without repeating what was there said, I purpose to explain the meaning and effect of the three maxims which limit the exercise of the equitable jurisdiction, and to ascertain and formulate, if possible, such conclusions as shall be

[1] See Adams on Eq., pp. 360, 361, 362 [m. p. 175], where this doctrine is expressly stated. Judge Story also lays down the same rule in the most positive manner. Eq. Jur., § 303; Rawden v. Shadwell, Ambl. 269; Woodroffe v. Farnham, 2 Vern. 291. In Lord Portarlington v. Soulby, 3 My. & K. 104, the plaintiff had given a bill of exchange for money lost in gaming, which had been transferred to the defendant under such circumstances that he was not a *bona fide* holder without notice. Plaintiff sought to have the bill surrendered and canceled and the defendant enjoined from negotiating it and suing on it at law. The lord chancellor held that the jurisdiction was settled beyond a doubt, that the plaintiff was entitled to maintain the suit, and he continued an injunction which had been granted. In Wynne v. Callander, 1 Russ. 293, 296, 297, plaintiff lost money at play to defendant, and gave bills of exchange therefor; when they fell due he renewed them by giving others in their place. He brought a suit to have the latter securities surrendered and canceled. The M. R. granted the relief as asked, and the existence of the jurisdiction was hardly denied by counsel, and was regarded by the court as unquestionable. The M. R. expressly declared the plaintiff *particips criminis*, and for that reason and because of his delay in suing refused to give him costs. In Osbaldiston v. Simpson, 13 Sim. 513, securities given by the plaintiff in a gaming transaction were decreed to be given up and canceled, the V. C. treating the jurisdiction as firmly settled. See, also, Chapin v. Dake, 57 Ill. 295. In Skipwith v. Strother, 3 Rand. 214, it was held that a court of equity may enjoin a judgment recovered at law on a gaming contract. This decision necessarily involves the whole doctrine. If the creditor may be restrained from enforcing a judgment, he may certainly be restrained from proceeding upon the contract to obtain a judgment; and if the remedy of injunction is conceded, the jurisdiction to order a surrender and cancellation can not be consistently denied. Whenever the loser's contract is no longer executory, but he has performed it by conveying land or other property, the case is entirely different; to relieve him would be a violation of the general maxim. A cancellation of the conveyance is then properly denied. Cowles v. Raguet, 14 Ohio, 38, 55; Thomas v. Cronise, 16 Id. 54. If in these or other cases courts have gone further and held that equity has no power to cancel an *executory* gaming security, they have clearly misapprehended and misapplied the general maxim, and have reached a conclusion opposed to authority as well as to principle. Of course the equitable jurisdiction to grant the affirmative relief of cancellation will not be *exercised* whenever the losing party might have a perfect, certain, and adequate remedy at law by way of defense; it is therefore peculiarly appropriate when the gaming securities consist of negotiable instruments. It has not, however, been entirely confined to that species of securities.

sustained both by principle and by authority.[1] These maxims are, *ex turpi causa non oritur actio, in pari delicto melior est conditio possidentis,* or *in pari delicto melior est conditio defendentis.* What is meant by the "condition" of the possessor or the defendant, which is so much "better"—or, as the maxim sometimes reads, "stronger" (*potior*)—that it will not be disturbed? Plainly it is not the condition merely of an executory contract having been made and subsisting between the parties; the maxim does not refer to the condition of the executory contract which has been entered into remaining unaltered and unmolested. Otherwise, the setting up the illegality as a defense would be prohibited, for it would directly violate the maxim. The defense is always allowed, and this necessarily disturbs the condition of the contract. The "condition" referred to in the maxim is clearly the condition of the parties with respect to their property rights created by or resulting from the contract. If the contract is still executory, the promisor is left undisturbed in the possession of the money or other property which he agreed to pay or transfer; if the contract has been executed, the promisee is left undisturbed in the possession of the money or other property which has been paid or conveyed to him. This is the true meaning of the maxim, and it involves no requirement that the contract, as a *mere executory instrument,* should remain unmolested; it deals solely with the rights flowing, or which would flow from the agreement. The form, therefore, which correctly expresses the thought is, *melior est conditio possidentis;* "*defendentis*" is appropriate only when regarded as equivalent to *possidentis.* The foregoing analysis is not a mere verbal discussion. Upon the true signification given to "condition" in the maxim depends to a great extent the doctrine concerning affirmative equitable relief against illegal contracts.

§ 940. **In Pari Delicto: General Rules.**—The proposition is universal that no action arises, in equity or at law, from an illegal contract; no suit can be maintained for its specific performance, or to recover the property agreed to be sold or delivered, or the money agreed to be paid, or damages for its violation. The rule has sometimes been laid down as though it were equally universal, that where the parties are *in pari delicto,* no affirmative relief of any kind will be given to one against the other. This doctrine, though true in the main, is subject to limitations and exceptions which it is the special object of the

[1] Vol. 1, §§ 401, 402, 403, and notes.

present inquiry to determine.[1] As applications of this principle, the following rules may be regarded as settled where the parties are *in pari delicto*. If the contract has been voluntarily executed and performed, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid or property delivered, or a cancellation of the conveyance or transfer.[2] As long as the contract is executory, it can not be enforced in any kind of action brought directly upon it; the illegality constitutes an absolute defense.[3] As an application of the same doctrine

[1] Bosanquett v. Dashwood, Cas. temp. Talb. 38; Neville v. Wilkinson, 1 Bro. Ch. 543, 547; cited Jac. 67; Rawden v. Shadwell, Ambl. 269; Astley v. Reynolds, 2 Str. 915; Smith v. Bromley, 2 Dougl. 696, 697, 698; Osborne v. Williams, 18 Ves. 379; St. John v. St. John, 11 Id. 526, 535, 536; Knowles v. Haughton, Id. 168; Rider v. Kidder, 10 Id. 360, 366; Thomson v. Thomson, 7 Id. 470; East I. Co. v. Neave, 5 Id. 173, 181, 184; Watts v. Brooks, 3 Id. 612; Sharp v. Taylor, 2 Phil. 801; Batty v. Chester, 5 Beav. 103; Smith v. White, L. R., 1 Eq. 626; Newby v. Sharpe, Id., 8 Ch. D. 39; Sykes v. Beadon, Id., 11 Id. 170; York v. Merritt, 77 N. C. 213; Shaw v. Carlile, 9 Heisk. 594; Inhabitants of Worcester v. Eaton, 11 Mass. 368, 375–379; Wells v. Smith, 13 Gray, 207; Harvey v. Varney, 98 Mass. 118; Harrington v. Bigelow, 11 Paige, 349; Sweet v. Tinslar, 52 Barb. 271; Solinger v. Earle, 82 N. Y. 393; Marlatt v. Warwick, 19 N. J. Eq. 439; Cutler v. Tuttle, Id. 549, 562; Ownes v. Ownes, 23 Id. 60; Roman v. Mali, 42 Md. 513; Jones v. Gorman, 7 Ired. Eq. 21; Logan v. Gigley, 11 Ga. 243; Galt v. Jackson, 9 Id. 151; Adams v. Barrett, 5 Id. 404; D'Wolf v. Pratt, 42 Ill. 198; and see cases under preceding paragraphs concerning various illegal contracts.

[2] Solinger v. Earle, 82 N. Y. 393, 397, 399; Shaw v. Carlile, 9 Heisk. 594; York v. Merritt, 77 N. C. 213. See also cases cited in the last note, under the preceding paragraphs, and *ante* under §§ 401, 402. Several of the decisions referred to were rendered in actions at law; but as these rules prevail alike in equity and at law, such cases are authorities.

[3] Ibid. There are a few apparent exceptions or limitations. If money has been illegally borrowed and used by a corporation with the assent of its stockholders, the corporation may be estopped from setting up the illegality as a defense to a suit by the creditor. *In re* Cork etc. R'y, L. R., 4 Ch. 748; *In re* Magdalena St. Nav. Co., Johns. 690. Where the contract has been executed, the party in possession of the proceeds or profits may be unable to set up the illegality to defeat an action for an accounting, or to recover the proceeds, brought by a third person entitled to the money. Gilliam v. Brown, 43 Miss. 641; Harvey v. Varney, 98 Mass. 118; Sykes v. Beadon, L. R., 11 Ch. D. 170, 193, 197, *per* Jessel, M. R.; Worthington v. Curtis, Id., 1 Ch. D. 419, 423; Davies v. London etc. Co., Id., 8 Ch. D. 469, 477; Thomson v. Thomson, 7 Ves. 470; Tenant v. Elliott, 1 B. & P. 3; Farmer v. Russell, 1 B. & P. 296; Sharp v. Taylor, 2 Phil. 801; Joy v. Campbell, 1 Sch. & Lef. 328, 339; McBlair v. Gibbes, 17 How. (U. S.) 232, 237; Brooks v. Martin, 2 Wall. 70, 81; Tracy v. Talmage, 14 N. Y. 162; and see *ante*, vol. 1, § 403 and note. It should be observed that the defense of illegality is allowed from motives of public policy rather than from a regard for the interests of the objecting party. When a person, having actively participated in the illegal transaction, and having obtained all the benefit of it from the other party, refuses to perform his own executory undertaking, and sets up the illegality as a defense, his position considered by itself is unjust; but the law sustains it out of regard to the interests of society. The objection comes in appearance from the individual litigant, but in reality from society—the state—speaking through the courts. See Holman v. Johnson, Cowp. 341, 343, per Lord Mansfield; Wood v. Griffith, 1 Sw. 43. In a suit for the specific enforcement of a contract, therefore, if the

merely in a different form, while the agreement is executory, courts of equity may relieve the debtor or promising party by ordering the written instrument and other securities to be surrendered and canceled, and by granting the ancillary remedies of injunction, discovery, and the like. Whenever the circumstances are such that the defensive remedy at law would not be equally certain, perfect, and adequate, this jurisdiction will be exercised. The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto;* on the contrary, it carries that maxim into effect. It has already been shown that the maxim rightly interpreted does not require the condition of the parties *with respect to the subsisting executory contract*, to remain unchanged and undisturbed. The remedy of cancellation or injunction, under the circumstances, is simply the equitable proceeding identical with the setting up the illegality as a defense to defeat a recovery at law, and thus to get rid of the contract as a binding executory obligation. The parties are left undisturbed as to their property rights.[1]

illegality is not alleged, but is first disclosed by the evidence, the court will itself pursue the inquiry, and dismiss the suit upon the fact being established: Parken v. Whitby, T. & R. 366; Evans v. Richardson, 3 Meriv. 469. In respect to the *certainty* with which the illegality must be established, in order to be a defense in equitable suits on the contract, there is some discrepancy of opinion. By one theory, the agreement must appear with reasonable certainty to be *legal;* by the other, the *illegality* must be clearly shown by convincing evidence. In Johnson v. Shrewsbury etc. R'y, 3 De G. M. & G. 914, 923, Knight Bruce, L. J., said: "The court must be satisfied that there was not a reasonable ground for contending that it [*i. e.* the contract] is illegal or against the policy of the law." In Aubin v. Holt, 2 K. & J. 66, 70, V. C. Page Wood (Lord Hatherley) said: "The agreement must be legal or illegal; and it is not within the discretion of the court to refuse specific performance because an agreement *savors* of illegality; it must be shown to be illegal." The latter opinion would seem, upon principle, to be the correct one.

Mr. Adams lays down this rule in the most positive manner. Speaking of illegal contracts, he says: "Its invalidity will be a defense at law, while it remains unexecuted; and *pari ratione*, if its illegal character be not apparent on the face of it, will be a ground for cancellation in equity. * * * So long as the contract continues executory, the maxim of *in pari delicto* does not apply; for the nature of the contract would be a defense at law, and the decree of cancellation is only an equitable mode of rendering that defense effectual:" Batty v. Chester, 5 Beav. 103; W—— v. B——, 32 Beav. 574. In such cases the party can obtain and should ask nothing but a mere cancellation. If his allegations show that he still relies upon the provisions of the illegal contract for any relief growing out of it, whether specific performance, reformation, or pecuniary recovery, the court will refuse all aid: Batty v. Chester, *supra.* In W—— v. B——, a mortgage given upon a grossly immoral consideration was ordered to be surrendered up and canceled at the suit of the mortgagor. It can not be denied that this view has been rejected by certain American cases, which seem to show some misconception of the meaning and effect of the general maxim. See remarks, *ante*, in note under § 939. Where an assignment was made for an illegal

[1] The setting aside gaming contracts, heretofore considered, is merely a particular instance of this general rule. See *ante*, § 938, and cases cited.

§ 941. **In Pari Delicto: Limitation on the General Rules.** To the foregoing rules there is an important limitation. Even where the contracting parties are *in pari delicto* the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity *may* aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid, or property delivered in performance of the agreement. The cases in which this limitation may apply and the affirmative relief may thus be granted, include the class of contracts which are intrinsically contrary to public policy—contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts, in which, from their particular circumstances, incidental and collateral motives of public policy require relief.[1]

§ 942. **Not in Pari Delicto.**—Lastly, when the contract is illegal, so that both parties are to some extent involved in the illegality, in some degree affected with the unlawful taint, but are not *in pari delicto;* that is, both have not, with the same knowledge, willingness, and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy, a court of equity may, in furtherance of justice and of

purpose, and "where the purpose for which the assignment was made is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property back from the assignee who has given no consideration for it:" Symes v. Hughes, L. R., 9 Eq. 475, 479; Davies v. Otty, 35 Beav. 208. In such cases equity will not permit the assignee to work a fraud and retain the property himself by setting up the statute of frauds as a defense. Haigh v. Kaye, L. R., 7 Ch. 469; Lincoln v. Wright, 4 De G. & J. 16.

[1] It is not asserted that in *all* contracts which are illegal because opposed to public policy, relief will thus be given to a party *in pari delicto;* but simply that in this class of contracts the limitation finds its special field of operation. The equitable remedies of borrowers in usurious contracts are a familiar illustration. Marriage-brokerage contracts are another, the cases holding that money paid in pursuance of their stipulations may be recovered back. Reynell v. Sprye, 1 De G. M. & G. 660, 679, *per* Knight Bruce, L. J.; Benyon v. Nettlefold, 3 Macn. & G. 94, 102, 103; Hill v. Spencer, Ambl. 641; Rider v. Kidder, 10 Ves. 360, 366; Smith v. Bruning, 2 Vern. 392; Goldsmith v. Buning, 1 Eq. Cas. Abr. 89; Roberts v. Roberts, 3 P. Wms. 66, 74; Morris v. MacCullock, 2 Eden, 190; Ambl. 432; Hatch v. Hatch, 9 Ves. 292, 298; St. John v. St. John, 11 Ves. 526, 535, 536; Smith v. Bromley, cited 2 Dougl. 696, 697, 698; Eastabrook v. Scott, 3 Ves. 456; Cullingworth v. Loyd, 2 Beav. 385, 390, n.; McNeill v. Cahill, 2 Bligh, 228; Bellamy v. Bellamy, 6 Flor. 62, 103; Weakley v. Watkins, 7 Humph. 356; and see *ante*, § 403 and note.

a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require, and sometimes even by sustaining a suit brought to enforce the contract itself, or if this be impossible, by permitting him to recover the amount justly due by means of an appropriate action not directly based upon the contract. Such an inequality of condition exists, so that relief may be given to the more innocent party, in two distinct classes of cases: (1) It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, *if considered by themselves alone*, would show the parties equally in fault; but there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it had been voluntarily entered into.[1] (2) The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal, but is *intrinsically* unequal; is of such a nature that one party is necessarily innocent as compared with the other; the stipulations, undertakings, and position of one are essentially less illegal and blameworthy than those of the others.[2]

[1] Some of these cases were decisions at law, but they are none the less authorities on this point in equity. Smith v. Bromley, 2 Dougl. 696; Browning v. Morris, Cowp. 790; Smith v. Cuff, 6 M. & S. 160; Atkinson v. Denby, 7 H. & N. 934; Bosanquett v. Dashwood, Cas. temp Talb. 37, 40, 41; Osborne v. Williams, 18 Ves. 379; Bayley v. Williams, 4 Giff. 638 (an agreement made in consequence of threats to prosecute the plaintiff's son for forgery was canceled); Davies v. Otty, 35 Beav. 208 (a conveyance made under fear of being prosecuted for bigamy was set aside at the grantor's suit); Phalen v. Clark, 19 Conn. 421; Pinckston v. Brown, 3 Jones' Eq. 494. *See* Erie R. Co. v. Vanderbilt, 5 Hun, 123. Smith v. Bromley, *supra*, is one of the leading cases. The limitations which should be placed upon this and kindred cases are well stated in Solinger v. Earle, 82 N. Y. 393, 397, 399. While the *decision* in Solinger v. Earle is correct, the doubt which it suggests concerning Smith v. Bromley and other cases of the same class, is unfounded. The opinion of Lord Mansfield has been adopted and followed by other courts, has been approved by text-writers, and based upon principle; it will hardly be shaken at this day by a *dictum*.

[2] Cases of this class must largely depend upon their own particular circumstances. Relief is sometimes given even by enforcing the contract itself directly or indirectly. Osborne v. Williams, 18 Ves. 379; W—— v. B——, 32 Beav. 574; Prescott v. Norris, 32

§ 943. **Second. Constructive Fraud Inferred from the Condition and Relations of the Immediate Parties to the Transaction.**—This division embraces those cases in which a transaction, although it may be perfectly regular in its external form, and valid perhaps by the original rules of the common law, is impeachable in equity because it lacks that absolute *consent* which is regarded as essential by courts of equity. The equitable conception of true consent assumes a physical power of the party, an intellectual and moral power, and that he exercised these powers freely and deliberately. While the exe-

N. H. 101; White v. Franklin B'k, 22 Pick. 181, 186; Lowell v. Boston etc. R. R., 23 Id. 24, 32; Bellamy v. Bellamy, 6 Flor. 62, 103; Poston v. Balch, 69 Mo. 115; Tracy v. Talmage, 14 N. Y. 162, 167, *per* Selden, J.; 210, *per* Comstock, J., in whose opinions the subject is discussed most ably and exhaustively; see also Curtis v. Leavitt, 15 N. Y. 9.

Under the general doctrine of the text a few more specific rules have been settled which I will briefly state. It is true these rules have generally been applied in actions at law; but cases involving the same questions, and depending upon the same principle, might arise in equity, and these rules and decisions would then furnish an authoritative guide for the courts of equity. The following propositions determine when an action may or may not be maintained upon the illegal contract itself: (1) Where a contract of sale or of lending is made, or any other contract by which money or other property is transferred or agreed to be transferred, the *mere knowledge or belief* of the vendor or the lender, that the purchaser or borrower intends to put the money or property thus acquired to some illegal use, does not render the contract void as against the vendor or lender, and does not prevent him from maintaining an action upon it to recover the purchase price of the property sold or agreed to be sold, or to recover back the money loaned. Although the purchaser or borrower may be completely *in delicto*, and his own illegal purpose may prevent *him* from maintaining any action on the contract, the vendor or lender is not in equal delict. (2) But if the illegal purpose of the purchaser or borrower *enters into and forms a part of the very contract itself;* in other words, if it is *stipulated* as a part of the contract that the money or property is to be used for an illegal purpose; or if the vendor or lender parts with the property or money with the express intention on his own side of having it used for an illegal purpose; or if the vendor or lender, knowing of the unlawful purpose intended by the buyer or borrower, does anything in addition to the mere sale or loan to aid or carry into effect that illegal purpose, then in either of these cases the contract is illegal as to both parties; both are *in pari delicto*, and neither of them can maintain any action upon the contract, or to obtain relief for its non-performance. (3) The first of these propositions is subject, however, to the following exceptions: If the vendor or lender has simply a knowledge that the purchaser or borrower intends to use the property or money for the purpose of committing some positive *crime*, such mere knowledge will prevent him from recovering the price or maintaining any action. Tracy v. Talmage, 14 N. Y. 162, 167, 210; Holman v. Johnson, Cowp. 341; Biggs v. Lawrence, 3 T. R. 454; Clugas v. Penaluna, 4 Id. 466; Waymell v. Reed, 5 Id. 599; Hodgson v. Temple, 5 Taunt. 181; Pellecatt v. Angell, 2 Cr. M. & R. 311; Bowry v. Bennet, 1 Camp. 348; Cheney v. Duke, 10 Gill & J. 11. Another group of authorities sustain the doctrine that if the vendor or lender *can be connected in intention* with the illegal purpose, it is enough to defeat an action by him, even though the illegal purpose is not expressly specified in the contract, and although he does not do any act in furtherance of the illegal purpose beyond the mere entering into the agreement. This is the farthest limit to which the cases go. Lightfoot v. Tenant, 1 B. & P. 551; Cannan v. Bryce, 3 B. & Ald. 179; McKinnell v. Robin-

cution of an instrument in the regular legal manner will undoubtedly, in the absence of all contrary evidence, raise a *prima facie* presumption that the consent was present, the real consent may be prevented or destroyed by surrounding physical circumstances, by the want of intellectual or moral capacity in the party himself, or by physical, intellectual, or moral force controlling the free operations of his own will. This phase of so-called constructive fraud necessarily involves a great variety of instances, and several degrees of invalidity. It includes transactions absolutely void from complete incapacity, others

son, 3 M. & W. 434; Gaslight Co. v. Turner, 5 Bing. N. C. 666; 6 Id. 324; White v. Buss, 3 Cush. 448. The illegal contract may also be sometimes enforced *indirectly* at the suit of the more innocent party by an action not brought upon the very contract itself. It is a well-settled doctrine with respect to implied contracts, that where an express contract does not involve a *malum in se*, but is made illegal solely by some statute, and the parties are not, from the nature of their respective stipulations or their relations, *in pari delicto*, the more innocent one may maintain an action upon implied contract, to recover back the consideration, or the money advanced, or the value of the property, etc. In such a case the less guilty party is entitled to relief whether the agreement has been executed on both sides, or whether it be executory on the side of the defendant. What contracts are thus unequal in their illegality, so that the doctrine of implied promise may be invoked, must depend in great measure upon the language of the statute creating the illegality. It may be said, in general, that if the act prohibited is in itself innocent or indifferent, and the statute imposes a penalty or loss on one party only, or addresses its prohibitions and sanctions in consequence of a violation to one party only of the contract, then the illegality of the two parties is unequal. Although the doctrine of implied promises and actions on implied contracts belongs primarily and peculiarly to the law, yet this is chiefly so as it affects the forms of action and rules of pleading. Exactly the same circumstances arise in equity, and the granting of equitable relief will then depend upon exactly the same principles; although under the equitable notions of remedies, the suit may not be regarded or represented as based upon an implied promise. See Jaques v. Golightly, 2 W. Bl. 1073; Browning v. Morris, 2 Cowp. 790; Jaques v. Withy, 1 H. Bl. 65; Williams v. Hedley, 8 East, 461; Worcester v. Eaton, 11 Mass. 368; White v. Franklin B'k, 22 Pick. 181; Lowell v. Boston etc. R. R., 23 Id. 24; Atlas B'k v. Nahant B'k, 3 Met. 581; Mount v. Waite, 7 Johns. 434. The doctrine finds one of its most important applications in the case of contracts of corporations which are made illegal by their charters or by other statutes, and *a fortiori*, in the case of their contracts which are merely *ultra vires*. Pratt v. Short, 79 N. Y. 437, 445–448; Tracy v. Talmage, 14 Id. 162, 167, 210 (overruling Leavitt v. Palmer, 3 N. Y. 19, and Talmage v. Pell, 7 N. Y. 328); Curtis v. Leavitt, 15 Id. 9, 97, *per* Comstock, J., and see opinion of Selden, J.; Utica Ins. Co. v. Scott, 19 Johns. 1; Utica Ins. Co. v. Cadwell, 3 Wend. 296; Utica Ins. Co. v. Bloodgood, 4 Id. 652; Buffalo City B'k v. Codd, 25 N. Y. 163–169; Parker v. Rochester, 4 Johns. Ch. 329, 332; Robinson v. Bland, 2 Burr. 1077. As to agreements *ultra vires*, see Bissell v. Mich. So. etc. R. R., 22 N. Y. 258; Buffett v. Troy & B. R. R., 40 Id. 168; Whitney Arms Co. v. Barlow, 63 Id. 62; N. Y. State L. & T. Co. v. Helmer, 77 Id. 64; Oil Creek etc. R. R. v. Pa. Tran. Co., 83 Pa. St. 160; Darst v. Gale, 83 Ill. 136; Thompson v. Lambert, 44 Iowa, 239; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; *Ex parte* Chippendale, 4 De G. M. & G. 19; *In re* National etc. Soc., L. R., 5 Ch. 309; *In re* Cork etc. Ry., Id., 4 Ch. 748; Att'y-Gen. v. Great Eastern Ry., Id., 11 Ch. D. 449 and cases cited; Mulliner v. Midland Rv., Id., 11 Ch. D. 611.

which are voidable, and others which are only presumptively invalid and which throw the burden of proof upon the parties claiming their benefit to overcome this presumption.[1] The whole subject is therefore separated into two branches: (1) Transactions void or voidable with persons totally or partially incapacitated. (2) Transactions presumptively invalid between persons in fiduciary relations.

§ 944. **1. Transactions Void or Voidable with Persons Totally or Partially Incapacitated.**—The incapacities embraced under this head are either total or partial. They may be created by the policy of the law, such as coverture and infancy; they may be intellectual, such as insanity, mental weakness, intoxication; they may result from external forces, physical or moral, such as duress, undue influence, pecuniary necessity; or they may inhere in the very position and circumstances of the parties, such as sailors, expectant heirs, and reversioners. In several instances, which are placed under this head because they are governed by the same doctrine and rules, it must be admitted that the term "incapacity" can be used only by way of analogy.[2]

[1] This last group was described in Cowee v. Cornell, 75 N. Y. 99, by Hand, J.: "It may be stated as universally true that fraud viatiates all contracts, but as a general thing it is not presumed but must be proved. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary, and well understood. This doctrine is well settled. And this is, I think, the extent to which the well-considered cases go, and is the scope of constructive fraud." The learned judge is clearly mistaken in the last statement that his description covers all instances of "constructive fraud;" and, with all deference, it seems to me that he has mingled together and confused two distinct classes of cases, which are governed by quite different rules; namely, those in which, from the relations of the parties, invalidity is merely presumed, and the burden of proof is cast upon the one benefited to overcome such presumption by showing good faith; and those in which the voidable character is inferred as a conclusion of fact, without any presumption, from the partial incapacity of one party, or the overmastering influence exerted by the other. In the latter class, if the evidence of the incapacity or unlawful influence is satisfactory, the voidable character of the transaction results as a necessary conclusion; there is no mere presumption to overcome. It is of great importance to keep these two classes distinct, otherwise the whole subject will become confused and inaccurate.

[2] In other words, there is no true "incapacity;" the term is applied only to these instances because the condition of the parties is analogous to that of persons who are affected by some real incapacity, and they are all governed by the same rules. The nature and extent of several of the most important incapacities mentioned in this division are fully discussed in treatises

§ 945. **Coverture.**—At the common law, married women were without the capacity to bind themselves by contract, and their agreements were in general void in equity as well as at law. With respect to their equitable separate property, however, married women are regarded by equity, independently of statutes, in many respects as though they were single; they are permitted to deal with such estate, and to make contracts concerning it; and such contracts are enforced by courts of equity against the property, though not against the married women personally.[1] Coverture, however, is no excuse in equity, for fraud; in other words, the fraud of a married woman will furnish an occasion for appropriate equitable relief, and the fact that the fraudulent party is a married woman will not prevent such relief.[2] *Infancy.*—The incapacity of infants to enter into binding contracts is the same in equity as in law; but such contracts are generally voidable only, and may therefore be ratified after the infant attains his majority. Fraud, however, will prevent the disability of infancy from being made available in equity. If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were adult, and may cancel a conveyance or executed contract obtained by fraud.[3]

upon contracts and upon persons. I shall describe them only so far as may be necessary to indicate the equitable rules concerning them, and to show the mode of exercising the equitable jurisdiction. Among these are coverture, infancy, insanity, *non compos mentis*, intoxication, duress, etc.

[1] Hulme v. Tenant, 1 Bro. Ch. 16; 1 Eq. Lead. Cas. 679 (4th Am. ed.); Murray v. Barlee, 3 My. & K. 209, 220; Johnson v. Gallagher, 3 De G. F. & J. 494. The subject of married women's contracts in equity is treated in a subsequent chapter. The modern legislation concerning married women's property and contracts has made great changes in the rules which originally prevailed at law and in equity. An abstract of this legislation will be given in the subsequent chapter mentioned above.

[2] The relief may be defensive, by defeating a suit brought by the married woman; or it may be affirmative, as setting aside a fraudulent conveyance or agreement; pecuniary relief would not be given against her personally, on account of her fraud, unless permitted by the modern legislation. Savage v. Foster, 9 Mod. 35; Vaughan v. Vanderstegen, 2 Drew, 363, 379; Sharpe v. Foy, L. R., 4 Ch. 35; *In re* Lush's Trusts, Id., Id. 591; McHenry v. Davies, Id., 10 Eq. 88; Jones v. Kearney, 1 Dr. & War. 134; Hobday v. Peters, 28 Beav. 354; Schmitheimer v. Eiseman, 7 Bush, 298; Curd v. Dodds, 6 Id. 681; Sexton v. Wheaton, 8 Wheat. 229. The American decisions are conflicting on the question, how far a married woman is estopped by fraud from alleging her coverture. In addition to those cited *ante* in the section on estoppel, see Keen v. Coleman, 39 Pa. St. 299; Glidden v. Strupler, 52 Id. 400; B'k of U. S. v. Lee, 13 Pet. 107; Drake v. Glover, 30 Ala. 382.

[3] *Ex parte* Unity Bank, 3 De G. & J. 63; Nelson v. Stocker, 4 Id. 458, 464; Cory v. Gertcken, 2 Madd. 40; Wright v. Snowe, 2 De G. & Sm. 321; Hannah v. Hodgson, 30 Beav. 19, 25; Overton v. Banister, 3 Hare, 503; Clarke v. Cobley, 2 Cox, 173 Lemprière v. Lange, L. R., 12 Ch. D. 675 (lease obtained by fraud set aside).

§ 946. **Insanity.**—In general a lunatic, idiot, or person completely *non compos mentis*, is incapable of giving a true consent in equity, as at law; his conveyance or contract is invalid, and will generally be set aside.[1] While this rule is generally true, the *mere* fact that a party to an agreement was a lunatic, will not operate as a defense to its enforcement, or as ground for its cancellation. A contract executed or executory made with a lunatic in good faith, without any advantage taken of his position, and *for his own benefit*, is valid both in equity and at law.[2] And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken and with perfect good faith, a court of equity will not set it aside, if the parties can not be restored to their original position and injustice would be done.[3] The conveyance or agreement of a monomaniac will be defeated or set aside if it is the result of his insane delusion.[4]

In Martin v. Gale, Id., 4 Ch. D. 428, a deed given by an infant to secure the repayment of money advanced for necessaries, was held voidable, although he was liable for the money actually loaned; and see *Ex parte* Taylor, 8 De G. M. & G. 254. An infant may be estopped from asserting his title when he has intentionally concealed it, Savage v. Foster, 9 Mod. 35.

[1] Manning v. Gill, L. R., 13 Eq. 485; Price v. Berrington, 3 Macn. & G. 486; Gibson v. Soper, 6 Gray, 279; Arnold v. Richmond Iron Works, 1 Gray, 434; Allis v. Billings, 6 Met. 415; Howe v. Howe, 99 Mass. 88; Ingraham v. Baldwin, 9 N. Y. 45; Beals v. See, 10 Barr, 56; Bensell v. Chancellor, 5 Whart. 371, 376; Ballard v. McKenna, 4 Rich. Eq. 358; Frazer v. Frazer, 2 Del. Ch. 260; Breckenridge v. Ormsby, 1 J. J. Marsh, 236; Ashcraft v. De Armond, 44 Iowa, 229; Knelcamp v. Hidding, 31 Wisc. 503. As to defense of the mortgagor's lunacy set up in a foreclosure suit, and the right to have the issue tried at law, see Jacobs v. Richards, 5 De G. M. & G. 55. A conveyance will not be set aside, on the ground of the grantor's lunacy, as against a *bona fide* purchaser. Ashcraft v. De Armond, 44 Iowa, 229. Several of these cases hold that the deeds of lunatics are voidable only and not void. Freed v. Brown, 55 Ind. 310.

[2] *Ex parte* Hall, 7 Ves. 261, 264; Selby v. Jackson, 6 Beav. 192, 204; Nelson v. Duncombe, 9 Id. 211; Snook v. Watts, 11 Id. 105; Stedman v. Hart, Kay, 607; Fitzgerald v. Reed, 9 Sm. & Mar. 94.

[3] Niell v. Morley, 9 Ves. 478, 482; Sergeson v. Sealy, 2 Atk. 412; Price v. Berrington, 3 Macn. & G. 486; Manby v. Bewicke, 3 K. & J. 342; Campbell v. Hooper, 3 Sm. & Giff. 153; Williams v. Wentworth, 5 Beav. 325; Jacobs v. Richards, 18 Id. 300; Yauger v. Skinner, 1 McCarter, 389; Carr v. Holliday, 5 Ired. Eq. 167. For an exception see Elliot v. Ince, 7 De G. M. & G. 475.

[4] There has been some discrepancy among the decisions on this subject. A few English cases, adopting a supposed medical theory that there is no such condition as monomania, hold that a person laboring under any single insane delusion is to be regarded as wholly insane, and his contracts as therefore voidable. The latest decisions lay down the rule as given in the text, and also its converse—that a conveyance or agreement which does not appear to be the result of the delusion is valid and binding. Jenkins v. Morris, L. R., 14 Ch. D. 674, following Banks v. Goodfellow, Id., 5 Q. B. 549, and Boughton v. Knight, Id., 3 P. & M. 64, and Smee v. Smee, 49 L. J. (P. & M.) 8, and overruling Waring v. Waring, 6 Moo. P. C. 341, and Smith v. Tebbetts, L. R., 1 P. & M. 398. The case of Jenkins v. Morris, decided by the V. C. and the court of appeal, is a full discussion of the subject and very remarkable in its facts. See, also, Creagh v. Blood, 2 Jo. & Lat. 509; Dew v. Clarke, 5 Russ. 163, 167; Steed v. Calley, 1 Keen,

The nature and extent of mental capacity and incapacity are the same at law and in equity.[1]

§ 947. **Mental Weakness.**—It is well settled that there may be a condition of extreme mental weakness and loss of memory, either congenital, or resulting from old age, sickness, or other cause, and not being either idiocy or lunacy, which will, *without any other incidents or accompanying circumstances*, of itself destroy the person's testamentary capacity, and *a fortiori* be ground for defeating or setting aside his agreements and conveyances.[2] It is equally certain that *mere* weak-mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own *free* will, is not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance.[3] If, as is frequently if not generally the case, the

620; Boyce v. Smith, 9 Gratt. 704. The same rule has been applied in this country to wills. Seamen's F. Soc. v. Hopper, 33 N. Y. 619; Clapp v. Fullerton, 34 Id. 190; Thompson v. Thompson, 21 Barb. 107; Stanton v. Wetherwax, 16 Id. 259; Lathrop v. Am. Bd. of For. Miss., 67 Id. 590; Mill's Appeal, 44 Conn. 484.

[1] Bennett v. Vade, 2 Atk. 324, 327, *per* Lord Hardwicke; Osmond v. Fitzroy, 3 P. Wms. 130; Manby v. Bewicke, 3 K. & J. 342.

[2] It is undoubtedly difficult to formulate any rule for determining the amount of this mental weakness. The following has been adopted by the highest authority, and is clearly just: "Had the testator a disposing memory? Was he able, without prompting, to recollect the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed the will?" If any of these questions must be answered in the negative, if such an amount of mind and memory does not exist, then there is no testamentary capacity. Den ex dem. Stevens v. Vancleve, 4 Wash. C. C. 262. 267, 268; Harrison v. Rowan, 3 Id. 580, 585, 586; Parish Will Case, 25 N. Y. 9, and cases cited. The same rule applies to conveyances and other agreements *inter vivos*. Ball v. Mannin, 3 Bligh, N. S. 1; Coleman v. Frazer, 3 Bush, 300; Shaw v. Dixon, 6 Id. 644; Shakespeare v. Markham, 72 N. Y. 400. Undoubtedly the line is very difficult to draw between this extreme condition of mental weakness and actual lunacy on one side, and *mere* weak-mindedness on the other; each case must largely depend upon its own facts; and some of the early cases refused to lay down any rule. Osmond v. Fitzroy, 3 P. Wms. 129; Bennett v. Vade, 9 Mod. 312, 315; Bell v. Howard, Id. 302; Manby v. Bewicke, 3 K. & J. 342; Harrod v. Harrod, 1 Id. 4, 7; Hudson v. Beauchamp, 3 Bligh, 20 (n.); Addis v. Campbell, 4 Beav. 401; Longmate v. Ledger, 2 Giff. 157, 163; Jackson v. King, 4 Cow. 207; Clarke v. Sawyer, 3 Sandf. Ch. 351, 357. Notwithstanding the difficulty, there is certainly such a condition of mental weakness and want of memory, which of itself, without any undue influence, unfairness, or other incident, will be ground for the interposition of equity and its relief either defensive or affirmative. See cases in next two notes.

[3] If a court can see that there were no inequitable incidents, such as undue influence, great ignorance and want of advice, very inadequate price, and the like, it will not interfere merely because one party possessed

mental weakness and failure of memory are accompanied by other inequitable incidents, and are taken undue advantage of through their means, equity not only may, but will interpose with defensive or affirmative relief.[1] Finally, in a case of real mental weakness a presumption arises against the validity of the transaction, and the burden of proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness and the capacity of the other party.[2]

very much less intelligence than the other, nor because the transaction is not one which the court in all respects approves. Ball v. Mannin, 3 Bligh N. S. 1; Osmond v. Fitzroy, 3 P. Wms. 129; Lewis v. Pead, 1 Ves. 19; Pratt v. Barker, 1 Sim. 1; 4 Russ. 507; Clark v. Malpas, 31 Beav. 80; Prideaux v. Lonsdale, 1 De G. J. & S. 433; Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; Stone v. Wilbern, 83 Ill. 105; Pickerell v. Morss, 97 Id. 220; Graham v. Castor, 55 Ind. 559; Mulloy v. Ingalls, 4 Neb. 115; Cowee v. Cornell, 75 N. Y. 91, 99, 100; Paine v. Roberts, 82 N. C. 451; Wellemin v. Dunn, 93 Ill. 511; Beverley v. Walden, 20 Gratt. 147; Mann v. Betterly, 21 Vt. 326; Howe v. Howe, 99 Mass. 88; *Ex parte* Allen, 15 Id. 58; Stiner v. Stiner, 58 Barb. 643; Hyer v. Little, 20 N. J. Eq. 443; Lozear v. Shields, 23 Id. 509; Aiman v. Stout, 42 Pa. St. 114; Dean v. Fuller, 40 Id. 474; Graham v. Pancoast, 6 Casey, 89; Nace v. Boyer, Id. 99; Greer v. Greers, 9 Gratt. 330, 332; Rippy v. Gant, 4 Ired. Eq. 443; Thomas v. Sheppard, 2 McCord Eq. 36; Oldham v. Oldham, 5 Jones' Eq. 89; Graham v. Little, 3 Id. 152; Long v. Long, 9 Md. 348; Prewett v. Coopwood, 30 Miss. 369; Killian v. Badgett, 27 Ark. 166; Darnell v. Rowland, 30 Ind. 342; Wray v. Wray, 32 Id. 126; Gratz v. Cohen, 11 How. (U. S.) 1, 19; Harding v. Handy, 11 Wheat. 103.

[1] Where mental weakness, not of itself sufficient to destroy capacity, is accompanied by undue influence, inadequacy of price, taking advantage of pecuniary necessities, ignorance and want of advice, misrepresentations or concealments, and the like, a contract or conveyance procured by their combined means will be defeated or set aside; it is not a simple presumption of invalidity which thus arises, but the presumption has become established. Of course, in the vast majority of instances, the mental weakness is wrought upon through such inequitable instrumentalities, in order to obtain a contract or conveyance for an inadequate consideration. Huguenin v. Baseley, 14 Ves. 273; Boyse v. Rossborough, 6 H. L. Cas. 2; Nottidge v. Prince, 2 Giff. 246; Baker v. Monk, 33 Beav. 419; Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; Moore v. Moore, 56 Cal. 89; Poston v. Balch, 69 Mo. 115; White v. White, 89 Ill. 460; Waddell v. Lanier, 62 Ala. 347; Allore v. Jewell, 4 Otto, 506; Bogie v. Bogie, 41 Wisc. 209; Bainter v. Fults, 15 Kans. 323; Harris v. Wamsley, 41 Iowa, 671; Mead v. Coombs, 26 N. J. Eq. 173; Lavette v. Sage, 29 Conn. 577; Whelan v. Whelan, 3 Cow. 537; Hutchinson v. Tindall, 2 Green's Ch. 357; Hetrick's Appeal, 58 Pa. St. 477; Brady's Appeal, 66 Id. 277; Hunt v. Moore, 2 Barr, 105; Highberger v. Stiffler, 21 Md. 338; Brogden v. Walker, 2 Har. & J. 285; Maddox v. Simmons, 31 Ga. 512; Rumph v. Abercrombie, 12 Ala. 64; Hill v. McLaurin, 28 Miss. 288; Tracey v. Sacket, 1 Ohio St. 54; Harding v. Handy, 11 Wheat. 103.

[2] Longmate v. Ledger, 2 Giff. 157, 164; Kempson v. Ashbee, L. R., 10 Ch. 15; Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; Shakespeare v. Markham, 72 N. Y. 400; Cowee v. Cornell, 75 Id. 91, 99, 100; Graves v. White, 4 Baxt. (Tenn.) 38; Bogie v. Bogie, 41 Wisc. 209; Galpin v. Wilson, 40 Iowa, 90; Wartemberg v. Spiegel, 31 Mich. 400; Whelan v. Whelan, 3 Cow. 537; Brice v. Brice, 5 Barb. 533, 549; Highberger v. Stiffler, 21 Md. 338; Marshall v. Billingsly, 7 Ind. 250; Martin v. Martin, 1 Heisk. 644, 653; Allore v. Jewell, 4 Otto, 506. The whole subject of weakness of mind is practically involved with undue influence. See Huguenin v. Baseley, 2 Eq. Lead. Cas. 1156, 1174, 1192, 1242 (4th Am. ed.), for a discussion in the editor's notes. Many cases partly turning upon mental weakness will be

§ 948. **Persons in Vinculis.**—Analogous to the condition of mental weakness is that of pecuniary or other necessity and distress. Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult; and whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice; and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively.[1] *Persons illiterate or ignorant.*—By the same analogy, where a person is illiterate or ignorant of the nature and extent of his own rights, or ignorant of the nature of the transaction in which he is engaging, and acts without professional or other advice, and advantage is taken of his condition to obtain a conveyance or contract upon an inadequate consideration, or otherwise unfair, equity will relieve by setting it aside or defeating its enforcement. The relief is granted on the ground that there was not an intelligent and free consent; if the circumstances show such consent equity will not interfere.[2]

found under the succeeding paragraphs of this subdivision.

[1] Relief will be granted in such cases with great caution. If it appears that, notwithstanding his necessitous condition, the party acted knowingly and intelligently, with a full comprehension of the situation, of his own acts, and of their consequences, and no undue pressure was used, equity will not interpose even though the consideration is inadequate. See *ante*, paragraphs on inadequacy of consideration. A presumption of invalidity arises from the circumstances, but that presumption *may* be overcome. Johnson v. Nott, 1 Vern. 271; Kemeys v. Hansard, Coop. 125; Williams v. Bayley, L. R., 1 H. L. 200, 218; Gould v. Okeden, 4 Bro. P. C. 198; Farmer v. Farmer, 1 H. L. Cas. 724; Boyse v. Rossborough, 6 Id. 2; Hetrick's Appeal, 58 Pa. St. 477; Blackwilder v. Loveless, 21 Ala. 371; Neilson v. McDonald, 6 Johns. Ch. 201; French v. Shoemaker, 14 Wall. 314; and see 2 Eq. Lead. Cas. 1230 (4th Am. ed.)

[2] Stanley v. Robinson, 1 R. & My. 527; Helsham v. Langley, 1 Y. & C. Ch. 175; Baker v. Monk, 4 De G. J. & S. 388; Clark v. Malpas, 4 De G. F. & J. 401; Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; Lyons v. Van Riper, 26 N. J. Eq. 337; Connelly v. Fisher, 3 Tenn. Ch. 382; Hawkins v. Hawkins, 50 Cal. 558; Fish v. Leser, 69 Ill. 394; Gasque v. Small, 2 Strobh. Eq. 72. Relief is granted in this case also with the greatest caution. Courts of equity have not in England, and much less in this country, adopted a rule that a conveyance or contract can not be valid unless made with professional advice. Lightfoot v. Heron, 3 Y. & C. 586; Haberdashers' Co. v. Isaac, 3 Jur. (N. S.) 611. In applying the rules contained in the above paragraph and in the preceding one, it should be remembered that in all of them the special circumstances—mental weakness, necessities, ignorance, etc.—are assumed to show the absence of a free consent, a free act of the will. The mere fact, therefore, that a party was very old, or illiterate, or sick, or in pecuniary necessity, will not invalidate a transaction, or be a ground for setting aside or defeating a contract, even though made upon an inadequate consideration and without advice, provided the evidence shows that he was competent to form an independent judgment, that he

§ 949. **Intoxication.**—Intoxication which merely exhilarates, and does not materially affect the understanding and the will, does not constitute a defense to the enforcement of an executory agreement, and much less is it any ground for affirmative relief.[1] An intoxication which is absolute and complete, so that the party is for the time entirely deprived of the use of his reason, and is wholly unable to comprehend the nature of the transaction and of his own acts, is a sufficient ground for setting aside or granting other appropriate affirmative relief against a conveyance or contract made while in that condition, even in the absence of any fraud, procurement, or undue advantage by the other party.[2] Where the intoxication is not thus absolute and complete, but is still sufficient to materially affect and interfere with the person's reason, judgment, and will, but is not procured nor taken advantage of unfairly by the other party, the doctrine is settled that a court of equity will not interfere in behalf of either of the parties to a contract which is made while one of them is in such a condition.[3] Finally, although the in-

really knew the nature and effect of the transaction in which he was engaged, and acted in it intelligently and deliberately. To impeach *such* a transaction requires proof of actual fraud or coercion. Courts do not set aside conveyances and contracts simply because the judges may regard them unfavorably. Lewis v. Pead, 1 Ves. 19; Harrison v. Guest, 6 De G. M. & G. 424; 8 H. L. Cas. 481; McNeill v. Cahill, 2 Bligh, 228; Curson v. Belworthy, 3 H. L. Cas. 742; Hunter v. Atkins, 3 My. & K. 113; Pratt v. Barker, 1 Sim. 1; Price v. Price, 1 De G. M. & G. 308; Hovenden v. Lord Annesley, 2 Sch. & Lef. 607, 639; Murray v. Palmer, Id. 474, 486; Cooke v. Lamotte, 15 Beav. 234; Ramsbottom v. Parker, 6 Madd. 6; Cowee v. Cornell, 75 N. Y. 91, 99, 100.

[1] Lightfoot v. Heron, 3 Y. & C. 586; Shaw v. Thackray, 1 Sm. & Giff. 537; Cavender v. Waddingham, 5 Mo. App. 457; Shackleton v. Sebree, 86 Ill. 616.

[2] There are some early *dicta* that equity would never grant affirmative relief to a party on the ground of his own intoxication, however complete, unless it was accompanied by conduct positively inequitable of the other party. The rule seems now to be settled, however, as stated in the text. Cooke v. Clayworth, 18 Ves. 12; Shackelton v. Sebree, 86 Ill. 616; Johnson v. Phifer, 6 Neb. 401; Bates v. Ball, 72 Ill. 108; Prentice v. Achorn, 2 Paige, 30; Hutchinson v. Brown, 1 Clarke Ch. 408; Crane v. Conklin, Saxton, 346; Wigglesworth v. Steers, 1 Hen. & Mun. 70; French v. French, 8 Ohio, 214; Phillips v. Moore, 11 Mo. 600. If a person is thus completely intoxicated, a party openly dealing with him must, of course, perceive his condition; it would seem that the party knowingly taking the conveyance or contract under these circumstances was necessarily chargeable with inequitable conduct.

[3] The court will not specifically enforce an executory contract against the intoxicated party at the suit of the other, nor will it set aside a conveyance or contract at the suit of the intoxicated party or his representatives; the parties are left to their remedies at law. This rule is an application of the maxim *in pari delicto*, etc. Johnson v. Medlicott, 3 P. Wms. 131 (n.); Cory v. Cory, 1 Ves. Sen. 19; Cooke v. Clayworth, 18 Ves. 12; Say v. Barwick, 1 V. & B. 195; Shackelton v. Sebree, 86 Ill. 616; Schramm v. O'Connor, 98 Ill. 539; Johnson v. Phifer, 6 Neb. 401; Bates v. Ball, 72 Ill. 108; Lavette v. Sage, 29 Conn. 577; Maxwell v. Pittenger, 2 Green's Ch. 156; Selah v. Selah, 23 N. J. Eq. 185; Clifton v. Davis, 1 Pars. Eq. 31; Futrill v. Futrill, 5 Jones' Eq. 61; Morrison v. McLeod, 2 Dev. & Bat. Eq.

toxication was only partial, if the other party produced it by his contrivance, and then took advantage of it, or made it the opportunity for acts of imposition, unfairness, and *a fortiori* fraud, equity will grant full affirmative relief.[1]

§ 950. **Duress.**—Whenever a conveyance or contract is obtained by actual duress, equity will grant relief defensively or affirmatively by cancellation, injunction, or otherwise, as the circumstances may require. In determining what constitutes duress—what force or threats—equity follows the law. Courts of equity undoubtedly grant relief in many classes of instances where there is no legal duress, and where the wronged party would, perhaps, be remediless at the common law, but these cases properly belong to the head of "undue influence."[2]

221; Harbison v. Lemon, 3 Blackf. 51; Dunn v. Amos, 14 Wisc. 106, and cases in next note.

[1] Cory v. Cory, 1 Ves. Sen. 19; Cooke v. Clayworth, 18 Ves. 12; Say v. Barwick, 1 V. & B. 195; Butler v. Mulvihill, 1 Bligh, 137; Lightfoot v. Heron, 3 Y. & C. 586; Shaw v. Thackray, 1 Sm. & Giff. 537; Nagle v. Baylor, 3 Dr. & War. 60; Addis v. Campbell, 4 Beav. 401; Martin v. Pycroft, 2 De G. M. & G. 785, 800; O'Connor v. Rempt, 29 N. J. Eq. 156; Crane v. Conklin, Saxton, 346; Prentice v. Achorn, 2 Paige, 30; Lavette v. Sage, 29 Conn. 577; Calloway v. Witherspoon, 5 Ired. Eq. 128; Freeman v. Dwiggins, 2 Jones' Eq. 162; Griffith v. Fred. Co. B'k, 6 Gill. & J. 424; Phillips v. Moore, 11 Mo. 600. The case of Pittenger v. Pittenger, 2 Green Ch. 156, contains *dicta* conflicting with the course of authority. Courts of equity are extremely cautious in granting *any* relief on the ground of intoxication, and they will seldom give the remedy of cancellation, unless there was conduct plainly inequitable by the other party; to do so would require a very strong case in which the evidence was most convincing. Experience shows that a man may be very much intoxicated and still be shrewd, hard in driving a bargain, and in every way competent to manage his own business. See Schramm v. O'Connor, 98 Ill. 539.

[2] Nicholls v. Nicholls, 1 Atk. 409; Roy v. Duke of Beauford, 2 Atk. 190; Thornhill v. Evans, Id. 330; Hawes v. Wyatt, 3 Bro. Ch. 156; Evans v. Llewellin, 1 Cox, 333, 340; Lamplugh v. Lamplugh, 1 Dick. 411; Talleyrand v. Boulanger, 3 Ves. 447; Underhill v. Horwood, 10 Id. 209, 219; Pickett v. Loggon, 14 Id. 215; Peel v. ———, 16 Id. 157; Middleton v. Middleton, 1 J. & W. 94; Gubbins v. Creed, 2 Sch. & Lef. 214; Williams v. Bayley, L. R., 1 H. L. 200; Reed v. Exum, 84 N. C. 430; Sharon v. Gager, 46 Conn. 189; Singer Man. Co. v. Rawson, 50 Iowa, 634; Thurman v. Burt, 53 Ill. 129; Harshaw v. Dobson, 64 N. C. 384; Jones v. Bridge, 2 Sweeny, 431; Acknowledgments of deeds by married woman obtained by duress. Louden v. Blythe, 4 Harris, 532; Michener v. Cavender, 2 Wright, 334, 337; McCandless v. Engle, 51 Pa. St. 309. It is sometimes difficult to determine whether the controlling influence amounts to actual, physical, or moral coercion. See Ramsbottom v. Parker, 6 Madd. 5; Middleton v. Sherburne, 4 Y. & C. 358, 389; Rhodes v. Bate, L. R., 1 Ch. 252. In determining what constitutes duress equity adopts the legal definition and rules. Miller v. Miller, 68 Pa. St. 486; McLin v. Marshall, 1 Heisk, 678. Lawful arrest or imprisonment, or prosecution of the party himself, or threats of such lawful arrest, imprisonment, prosecution, or litigation directed against the party himself, do not constitute duress; the same is true of many other species of threats. Threats of prosecution, etc., against a near relative of the party who executes a contract in consequence thereof, *may* be duress. In the following cases there was held to be no duress: Wright v. Remington, 41 N. J. Law, 48 (threats of a husband to kill himself if his wife did not sign his note as a surety); Heaps v. Dunham, 95 Ill. 583; Compton v. Bunker Hill Bk., 96 Ill. 301; Smillie v. Titus, 32 N. J. Eq. 51; State v. Harney, 57 Miss. 863;

§ 951. **Undue Influence.**—Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work upon in the condition or circumstances of the person influenced which render him peculiarly susceptible and yielding—his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like. All these circumstances, however, are incidental, and not essential. Where an antecedent fiduciary relation exists, a court of equity will *presume* confidence placed and influence exerted; where there is no such fiduciary relation, the confidence and influence must be *proved* by satisfactory extrinsic evidence; the rules of equity and the remedies which it bestows are exactly the same in each of these two cases. The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case and grants relief "where influence is acquired and abused, or where confidence is reposed and betrayed."[1] It is specially active and searching

Tooker v. Sloan, 30 N. J. Eq. 394; Fogg v. Union Bk., 4 Baxt. (Tenn.) 530; Landa v. Obert, 45 Tex. 539; Davis v. Luster, 64 Mo. 43; Plant v. Gunn, 2 Woods' C. C. 372: Smith v. Rowley, 66 Barb. 502; Mayhew v. Phœnix Ins. Co., 23 Mich. 105; Dixon v. Dixon, 22 N. J. Eq. 91; Seymour v. Prescott, 69 Me. 376; Fulton v. Lofts, 63 N. C. 393 (duress after a contract is made is not ground for relief).

In the proposed Civil Code of New York the following definitions are given of duress and menace, which have been adopted by the Civil Code of California:

N. Y. Civil Code, § 754; *Cal. Civil Code*, § 1569. "Duress consists in: 1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife" (citing Foshay v. Ferguson, 5 Hill, 154; Bates v. Butler, 46 Me. 387; Eadie v. Slimmon, 26 N. Y. 9; McClintick v. Cummins, 3 McLean, 158). "2. Unlawful detention of the property of any such person" (conceded to be contrary to the weight of authority). "3. Confinement of such person, lawful in form, but fraudulently obtained or fraudulently made, unjustly harassing or oppressive" (citing Strong v. Grannis, 26 Barb. 122; Richardson v. Duncan, 3 N. H. 508; Watkins v. Baird, 6 Mass. 511; Severance v. Kimball, 8 N. H. 386).

N. Y. Civil Code, § 755; *Cal. Civil Code*, § 1570. "Menace consists in a threat: 1. Of such duress as is specified in the first and third subdivisions of the last section" (citing Eadie v. Slimmon, 26 N. Y. 9; Whitefield v. Longfellow, 13 Me. 146). "2. Or of unlawful and violent injury to the person or property of any such person as is specified in the last section. 3. Or of injury to the character of any such person." (This last subdivision is conceded to be new legislation.)

[1] Smith v. Kay, 7 H. L. Cas. 750, 779, *per* Lord Kingsdown. Huguenin v. Baseley, 14 Ves. 273; 2 Eq. Lead. Cas, 1156, 1174–1176, 1189–1191 (note of Eng. ed.); 1192–1215 (note of Am. ed.) The subject of undue influence is intimately connected with that of

in dealing with gifts, but is applied when necessary to conveyances, contracts, executory and executed, and wills.

fiduciary relations; particular illustrations will be given in the next succeeding subdivision. It is impossible to formulate a single definition which shall embrace all forms and phases of undue influence; each case must largely depend upon its own circumstances. The following propositions, however, embody the doctrine. The conveyance or agreement must be that of the party himself; his own voluntary disposition. If such influence be exerted upon him, such mental, moral, or physical coercion employed towards him, that the act is not really his own, but is another's, then it is voidable. But within this limit there is no objection to argument, persuasion, or even influence, brought to bear upon a party, provided his mind is able to act and is left free to decide and act upon the considerations which are addressed to it, so that the agreement is really his own voluntary act. Still, persuasions and other such conduct by the one benefited, are always looked upon as suspicious; they throw upon him the burden of showing that the other party acted freely. The question frequently arises on the probate of wills. In Hall v. Hall, 37 L. J., P. & M. 40; L. R., 1 P. & M. 481, Mr. Justice Wilde laid down the rules in a most admirable manner which apply to the execution of instruments *inter vivos* as well as to wills: "To make a good will a man must be a free agent, but all influences are not unlawful. Persuasion appeals to the affections, or ties of kindred, to a sentiment of gratitude for past services or pity for future destitution or the like. These are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist; moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort; these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, not driven, and his will must be the offspring of his own volition and not that of another." See, also, illustrating undue influence in obtaining wills, where the will was held invalid, Parish Will Case, 25 N. Y. 9; Tyler v. Gardiner, 35 Id. 559; Christy v. Clarke, 45 Barb. 529; where the will was sustained, Gardiner v. Gardiner, 34 N. Y. 155; Horn v. Pullmann, 72 Id. 268; Meeker v. Meeker, 75 Ill. 260; Barnes v. Barnes, 66 Me. 286.

The following cases are illustrations of undue influence in other transactions: Dent v. Bennett, 4 My. & Cr. 269; Billage v. Southee, 9 Hare, 534, 540; Beanland v. Bradley, 2 Sm. & Gif. 339; Wright v. Vanderplank, 8 De G. M. & G. 133, 137; Prideaux v. Lonsdale, 1 De G. J. & S. 433; *In re* Metcalfe's Trusts, 2 Id. 122; Toker v. Toker, 3 Id. 487; Skottowe v. Williams, 3 De G. F. & J. 535; Tomson v. Judge, 3 Drew. 306; Broun v. Kennedy, 33 Beav. 133; Hoghton v. Hoghton, 15 Id. 278; Cooke v. Lamotte, 15 Id. 234; Casborne v. Barsham, 2 Id. 76; Lyon v. Home, L. R., 6 Eq. 655 (a striking case); Baker v. Loader, Id., 16 Id. 49; Everitt v. Everitt, Id., 10 Id. 405; Rhodes v. Bate, Id., 1 Ch. 252; Turner v. Collins, Id., 7 Id. 329; Ellis v. Barker, Id., 7 Id. 104; Moxon v. Payne, Id., 8 Id. 881; Kempson v. Ashbee, Id., 10 Id. 15; Fulham v. McCarthy, 1 H. L. Cas. 703; Savery v. King, 5 Id. 627; Smith v. Kay, 7 Id. 750; Dalton v. Dalton, 14 Nev. 419; Moore v. Moore, 56 Cal. 89; Biglow v. Leabo, 8 Oreg. 147; Waddell v. Lanier, 62 Ala. 347; Mulock v. Mulock, 31 N. J. Eq. 594; Thornton v. Ogden, 32 Id. 723; Miller v. Simonds, 5 Mo. App. 33; Graves v. White, 4 Baxt. 38; Leighton v. Orr, 44 Iowa, 679 (a very instructive case); Davis v. Dunne, 46 Id. 684; Ranken v. Patton, 65 Mo. 378; Bivins v. Jarnigan, 3 Baxt. 282; Bailey v. Woodbury, 50 Vt. 166; Yard v. Yard, 27 N. J. Eq. 114; Ross v. Ross, 6 Hun, 80; Bailey v. Litten, 52 Ala. 282; Mead v. Coombs, 26 N. J. Eq. 173; Lyons v. Van Riper, 26 Id. 337; Brock v. Barnes, 40 Barb. 521; Wistar's Appeal, 54 Pa. St. 60; Greenfield's Estate, 2 Harris, 489, 507; Todd v. Grove, 33 Md. 188; Turner v.

§ 952. **Sailors.**—From the peculiar qualities which, as is well known, belong to sailors as a class, from the circumstances in which they are placed, and the temptations to which they are exposed, courts and legislatures have long treated them as almost *non sui juris*, as analogous to infants or expectant heirs, and therefore as in some respects wards of court. It seems to be settled that equity has jurisdiction over contracts by sailors concerning wages made with their employers, and concerning the disposition of their prize money made with third persons, and will scrutinize such agreements with the utmost vigilance, and will cancel them if they are at all unfair, one-sided, or otherwise inequitable.[1]

§ 953. **Expectants, Heirs, and Reversioners.**—Expectant heirs, reversioners, and holders of other expectant interests, stand in a position different from that of all other persons *sui juris*, and a special jurisdiction for their protection has long been well established. This jurisdiction rests upon two distinct foundations. In the first place, heirs, reversioners, and other expectants, during the life-time of their ancestors and life-tenants, are considered as peculiarly liable to imposition, and exposed to the temptation and danger of sacrificing their future interests in order to meet their present wants. Being sometimes in actual, but more often in imaginary distress, they do not stand upon an equal footing with those who deal with them concerning their expectant estates; and such persons are in a position to take advantage of their condition, and to dictate inequitable and even extravagently hard terms in any contract of loan or purchase which may be made. In the second place, the dealings of heirs and reversioners with their expectant interests are often a gross violation of the moral, if not legal duties which they owe to their ancestors and life-tenants who are the present owners of the property, and from or through whom their future estates will come, and may be a virtual fraud upon the rights of those parties. Equity, therefore, treats such dealings with expectant

Turner, 44 Mo. 535; Taylor v. Taylor, 8 How. (U. S.) 183. In the following cases it was held there was no undue influence: Paine v. Roberts, 82 N. C. 451; McClure v. Lewis, 4 Mo. App. 554; Crowe v. Peters, 63 Mo. 429; Hollocher v. Hollocher, 62 Mo. 267 (an instructive case, showing what kind of influence is *not* undue).

[1] How v. Weldon, 2 Ves. Sen. 516, 518; Taylour v. Rochfort, Id. 281; Baldwin v. Rochford, 1 Wils. 229. If this jurisdiction was ever exercised by the American courts of equity—which I think is very doubtful from the absence of reported cases, and from the fact that matters of foreign commerce belong exclusively to the cognizance of the national government—it has been made obsolete by the stringent legislation of congress for the protection of sailors which may be enforced by the United States courts.

interests as a possible fraud upon the heirs and reversioners who are immediate parties to the transaction, and as a virtual fraud upon their ancestors, life-tenants, and other present owners. Upon these two considerations the equitable jurisdiction is founded. The rule is well settled that all conveyances, sales, and charges, and contracts of sale or charge, of their future and expectant interests made by heirs, reversioners, and other expectants during the life-time of their ancestors or life-tenants, *upon an inadequate consideration*, will be relieved against in equity, and either wholly or partially set aside. In this instance, fraud is inferred from *mere* inadequacy of consideration. All dealings by such expectants are not necessarily and absolutely voidable. But in every such conveyance or contract with an heir, reversioner, or expectant, a presumption of invalidity arises from the transaction itself, and the burden of proof rests upon the purchaser or other party claiming the benefit of the contract, to show affirmatively its perfect fairness, and that a full and adequate consideration was paid—that is, the fair market value of the property, and not necessarily the value as shown by the life tables. If he succeeds in overcoming the presumption by showing these facts, the transaction will stand; otherwise it will be set aside. It is not necessary to show, as a condition of relief, that the heir or reversioner was an infant, or that he was in a condition of actual distress when the bargain was made; a court of equity presumes distress; the very fact of the sale or charge shows *prima facie* that he was not in a position to make his own terms, and that he submitted to have them dictated to him by the other party. The foregoing rules assume simply that there was an inadequacy of consideration, without any further element of fraud. If, in addition, the circumstances show actual fraud, misrepresentations, or concealments, oppression, taking undue advantage of real necessities, or other unfair, inequitable dealing by the party who acquires the expectant interest, a court of equity will grant full relief without regard to any presumption.[1]

[1] Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125; 1 Eq. Lead. Cas. 773, 809–825 (Eng. ed., note); 825–836 (Am. ed., note). The subject is fully discussed and the authorities examined in these notes. The American editor cites and comments upon the American decisions, especially those which have departed from the doctrine as generally settled. Although the subject is of great importance in England, it has comparatively little practical interest in the United States. I have not deemed it necessary, therefore, to enter into any extended discussion of the more special rules and limitations; it seemed sufficient to state the general conclusions and to cite the important authorities. The following cases illustrate the doctrine, and show how it has been applied by the American courts: Earl of Aylesford v. Morris, L. R., 8 Ch. 484; Tyler v. Yates, Id., 11 Eq. 265; 6 Ch. 665; Miller v. Cook,

Whenever a conveyance, sale, or contract for sale is set aside in this manner on the sole ground of inadequacy of consideration, the relief is granted only upon condition that the sum actually paid or loaned, with interest thereon, is refunded; and the court will so frame its decree, if necessary, that the conveyance or sale, instead of being immediately and absolutely canceled, shall stand as security for the amount which, it is adjudged, should be repaid.[1] In analogy with this general doctrine concerning

Id., 10 Eq. 641; *In re* Slater's Trusts, Id., 11 Ch. D. 227; Perfect v. Lane, 3 De G. F. & J. 369; Webster v. Cook, L. R., 2 Ch. 542, 546; Edwards v. Burt, 2 De G. M. & G. 55; O'Rorke v. Bolingbroke, L. R., 2 App. Cas. 814–834; Savery v. King, 5 H. L. Cas. 627; Aldborough v. Trye, 7 Cl. & Fin. 436; Shelly v. Nash, 3 Madd. 232, 235; Fox v. Wright, 6 Id. 111; Gowland v. De Faria, 17 Ves. 20, 24; Peacock v. Evans, 16 Id. 512; Davis v. Marlborough, 2 Sw. 108, 154; Edwards v. Browne, 2 Coll. 100; Hincksman v. Smith, 3 Russ. 433, 435; King v. Hamlet, 4 Sim. 223; 2 My. & K. 456; 3 Cl. & Fin. 218; Newton v. Hunt, 5 Sim. 511; Roberts v. Tunstall, 4 Hare, 257; Bromley v. Smith, 26 Beav. 644; Jenkins v. Pye, 12 Pet. 241; Larrabee v. Larrabee, 34 Me. 477; Poor v. Hazleton, 15 N. H. 564; Boynton v. Hubbard, 7 Mass. 112; Trull v. Eastman, 3 Met. 121; Fitch v. Fitch, 8 Pick. 480; Varick v. Edwards, 1 Hoff. Ch. 382; Power's Appeal, 63 Pa. St. 443; Davidson v. Little, 22 Id. 245, 252; Mastin v. Marlow, 65 N. C. 695; Butler v. Haskell, 4 Desau. 651; Nimmo v. Davis, 7 Tex. 26; Needles v. Needles, 7 Ohio St. 432; Lowry v. Spear, 7 Bush. 451; Meriweather v. Herran, 8 B. Mon. 162. In some cases the doctrine seems to have been rejected or only partially adopted; see Mayo v. Carrington, 19 Gratt. 74; Cribbins v. Markwood, 13 Id. 495. In Parmelee v. Cameron, 41 N. Y. 392, a sale of a legacy payable in future made by an improvident and dissipated legatee, was sustained.

Since the relief is based in part upon the ground that the sale by an heir or reversioner is a constructive fraud upon the ancestor, it has been held that if a father knew of his son's design to dispose of his expectancy, and did not dissent, the transaction would not come within the general rule, and would be upheld. King v. Hamlet, 4 Sim. 223; 2 My. & K. 456, 473. In this case Lord Brougham expresses a very strong opinion in favor of the exception. But, as in many other instances, Lord Brougham's opinion has not been sustained. It is settled, at least in England, that the *mere* fact of the ancestor's assent, approval, or even assistance will not prevent the court from giving relief. The doctrine is established to secure the rights of heirs and reversioners, and *their* rights can not be defeated by the action of the ancestor. This view seems to be in strict accordance with principle. Earl of Aylesford v. Morris, L. R., 8 Ch. 484, 491, *per* Lord Selborne; see, also, King v. Savery, 1 Sm. & Gif. 271; 5 H. L. Cas. 627; Talbot v. Staniforth, 1 J. & H. 484; Jenkins v. Stetson, 9 Allen, 128; McBee v. Myers, 4 Bush, 356. If, however, the transaction is a fair family or other arrangement for the benefit of all parties interested, in which the ancestor or life-tenant joins, and in which there is no undue influence, it will not be set aside on the ground of inadequacy. Tweddell v. Tweddell, Turn. & R. 13; Lord v. Jeffkins, 35 Beav. 7; Shelly v. Nash, 3 Madd. 232.

[1] This particular rule is a fine illustration of the maxim "he who seeks equity must do equity," and is based upon the plainest principles of right and justice. Those few American decisions which have departed from it, have so far failed to appreciate the essential conceptions of equity. *In re* Slater's Trusts, L. R., 11 Ch. D. 227; Tyler v. Yates, Id., 11 Eq. 265; 6 Ch. 665; Miller v Cook, Id., 10 Eq. 641; Bawtree v. Watson, 3 My. & K. 339; Wharton v. May, 5 Ves. 27, 68; Peacock v. Evans, 16 Ves. 512; Croft v. Graham, 2 De G. J. & S. 155; Boynton v. Hubbard, 7 Mass. 112; Boyd v. Dunlap, 1 Johns. Ch. 478; Williams v. Savage Man. Co., 1 Md. Ch. 306; 3 Id. 418; but see Small v. Jones, 6 Watts & S. 122; Seylar v. Carson, 69 Pa. St. 81.

dealings with expectant interests, courts of equity have extended a protection to young, inexperienced, and improvident heirs, by relieving against other kinds of unconscionable bargains which they may have made, and by reducing the claims against them to a reasonable amount.[1]

§ 954. **Post obit Contracts.** In strict analogy to the equitable relief against sales of expectancies, and depending upon the same reasons, is that against *post obit* contracts. A *post obit* contract is an agreement made by an expectant heir, successor, devisee, or legatee, whereby in consideration of a smaller sum loaned, he promises to pay to the creditor a much larger sum exceeding in amount the principal and lawful interest, upon the death of the person from whom he expects the inheritance, succession, or bequest, provided he himself should survive such person. Such an instrument is clearly an imposition upon the debtor, since it necessarily takes advantage of his actual or supposed necessities. It is also a gross fraud upon the ancestor or testator; it offers a premium upon his death; being a wagering contract, it renders the creditor's interests dependent upon his speedy death. *Post obit* contracts and all other instruments, essentially the same though differing in form, will be set aside. In granting this relief, as in the similar case of dealings with expectancies, where there are no special circumstances of unfairness or imposition, and the inadequacy of consideration is the sole ground of interference, the court will require a repayment to the lender of what is justly due, and may permit the security to stand for such amount until it is repaid.[2]

A modern English statute enacts that no purchase, made *bona fide*, of a reversionary interest shall be set aside merely on the ground of undervalue; 31 & 32 Vict., c. 4. It is held that as this statute is confined to *fair* purchases, the equitable doctrine concerning *unfair* transactions, and the jurisdiction to relieve heirs and reversioners who have been actually imposed upon, is left unaltered. *In re* Slater's Trusts, L. R., 11 Ch. D. 227; Earl of Aylesford v. Morris, Id., 8 Ch. 484; Tyler v. Yates, Id., 11 Eq. 265; 6 Ch. 665; Miller v. Cook, Id., 10 Eq. 641; nor are the doctrine and jurisdiction affected by the repeal of the usury laws; *Ibid;* and Croft v. Graham, 2 De G. J. & S. 155.

[1] Thus, where unscrupulous persons, taking advantage of such expectants, and furnishing them means for extravagance and dissipation, have sold them goods at outrageous prices or loaned them money at outrageous rates of interest, even when there are no statutes against usury, courts of equity have reduced the securities given for such claims to a fair amount. Croft v. Graham, 2 De G. J. & S. 155; Bill v. Price, 1 Vern. 467; Lamplugh v. Smith, 2 Id. 77; Whitley v. Price, 2 Id. 78; Brooke v. Galley, 2 Atk. 34, 35; Freeman v. Bishop, Id. 39. I venture to doubt whether this relief would be given by the courts of the American states unless the circumstances of a case showed *actual* fraud. The English policy of protecting ancestral estates has never prevailed in this country.

[2] Chesterfield v. Janssen, 2 Ves. Sen. 125, 157; 1 Eq. Lead. Cas. 773, 809, 825 (4th Am. ed.); Wharton v.

§ 955. **II. Transactions Presumptively Invalid between Persons in Fiduciary Relations.**—It is of the utmost importance to obtain an accurate conception of the exact *circumstances* under which the equitable principle now to be examined applies; otherwise the entire discussion of the doctrine will be confused and imperfect. In the various instances described in the preceding paragraphs there has been an *actual* undue influence consciously and designedly exerted upon a party who was peculiarly susceptible to external pressure on account of his mental weakness, old age, ignorance, necessitous condition, and the like. The existence of any fiduciary relation was unnecessary and immaterial. The undue influence being established *as a fact*, any contract obtained or other transaction accomplished by its means, is voidable, and is set aside without the necessary aid of any presumption. The single circumstance now to be considered, is the existence of some fiduciary relation, some relation of confidence subsisting between two parties. No mental weakness, old age, ignorance, pecuniary distress, and the like is assumed as an element of the transaction; if any such fact be present it is incidental, not necessary, immaterial, not essential. Nor does undue influence form a necessary part of the circumstances, except so far as undue influence, or rather the ability to exercise undue influence, is implied in the very conception of a fiduciary relation, in the position of superiority occupied by one of the parties over the other, contained in the very definition of that relation. This is a most important

May, 5 Ves. 27; Curling v. Townshend, 19 Id. 628; Fox v. Wright, 6 Madd. 111; Davis v. Duke of Marlborough, 2 Sw. 174; Crowe v. Ballard, 3 Bro. Ch. 117, 120; Gwynne v. Heaton, 1 Id. 1, 9; Earl of Aldborough v. Trye; 7 Cl. & Fin. 436, 462, 464; Bernal v. Donegal, 3 Dow, 133, 1 Bligh (N. S.), 594; *In re* Slater's Trusts, L. R., 11 Ch. D. 227; Earl of Aylesford v. Morris, Id., 8 Ch. 484; Pennell v. Millar, 23 Beav. 172; Benyon v. Fitch, 35 Id. 570; Boynton v. Hubbard, 7 Mass. 112 (the opinion of C. J. Parsons contains a full and admirable discussion of the doctrine concerning this class of contracts); and see Freme v. Brade, 2 De G. & J. 582.

Where an expectant heir or successor, upon a present consideration, makes a secret agreement to convey or pay to the creditor a large but uncertain portion of the estate which he may inherit or succeed to, in case he survives his parent or other ancestor, such contract is equally obnoxious to the equitable doctrine, and will be set aside, Boynton v. Hubbard, 7 Mass. 112; but an agreement by such an heir or successor, made with the consent of his ancestor, and for a fair consideration, to convey the property which may afterwards come to him by descent or succession, is valid, Fitch v. Fitch, 8 Pick. 480; as to fair and valid agreements among expectant heirs or successors to share the property which may come to them, see Hyde v. White, 5 Sim. 524; Wethered v. Wethered, 2 Sim. 183; Harwood v. Tooke, 2 Sim. 192; Beckley v. Newland, 2 P. Wms. 182; Trull v. Eastman, 3 Met. 121, 123. How far the various classes of agreements described in the foregoing paragraphs, may be ratified, confirmed, and thus made valid, is considered at the close of the next subdivision upon fiduciary relations.

statement, not a mere verbal criticism. Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject, than the treatment of actual undue influence and fiduciary relations as though they constituted one and the same doctrine.

§ 956. **The General Principle.**—It was shown in the preceding section that if one person is placed in such a fiduciary relation towards another that the duty rests upon him to disclose, and he intentionally conceals a material fact with the purpose of inducing the other to enter into an agreement, such concealment is an actual fraud, and the agreement is voidable without the aid of any presumption. We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption. One principle underlies the whole subject in all its applications; and this principle may be stated in a negative and in an affirmative form. Its negative aspect cannot be better expressed than in the following language of a most able judge in a recent decision: "The broad principle on which the court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed, to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him."[1] The principle was affirmatively stated with equal accuracy in the same case on appeal, as follows: "The jurisdiction exercised by courts of equity over the deal-

[1] Tate v. Williamson, L. R., 1 Eq. 528, 536, *per* Page-Wood, V. C. (Lord Hatherley); and see Cowee v. Cornell, 75 N. Y. 91, 99, 100, *per* Hand, J. In the passage last cited the learned judge has mingled up the doctrine concerning simple fiduciary relations, with that concerning actual undue influence or oppression.

ings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.*"[1] Courts of equity have carefully refrained

[1] Tate v. Williamson, L. R., 2 Ch. 55, 60, 61, *per* Lord Chelmsford. In Rhodes v. Bate, Id., 1 Id. 252, 257, L. J. Turner laid down some most important corollaries of the general principle, and distinguished it from the doctrine concerning undue influence exerted upon persons weak-minded, etc.: "I take it to be a well-established principle of this court, that persons standing in confidential relation towards others can not entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or the capacity of the person conferring the benefit, or the nature of the benefit conferred, affects the principle. Age and capacity are considerations which may be of great importance *in cases in which the principle does not apply;* but I think they are but of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence *founded upon confidence.* And, as to the nature of the benefit, the injury to the party by whom the benefit is conferred can not depend upon its nature." Also at p. 260: "I think that where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The *mere* fact that the relation is not called into action, is not, I think, sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it." In Billage v. Southee, 9 Hare, 534, 540, it was said: "No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and, in my opinion, this part of the jurisdiction of the court can not be too freely applied, either as to the persons between whom, or the circumstances in which, it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustee and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient—to be merely instances of the application of the principle. * * * It is said that the plaintiff intended to be liberal, and that this court would not prevent him from being so; and no doubt it would not if such were his intention. But intention imports knowledge, and liberality imports the absence of influence; and where a gift is set up between parties standing in a

from defining the particular instances of fiduciary relations, in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists *as a fact*, in which there is confidence reposed on one side, and the resulting superiority and influence on the other The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.

§ 957. **Two Classes of Cases.**—There are two classes of cases to be considered, which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, or contract, or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it *may* be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. The second class includes all those instances in which one party purporting to act in his fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary, as where a trustee or agent to sell, sells the property to himself. Such transactions are voidable at the suit of the beneficiary, and not merely presumptively or *prima facie* invalid. Nevertheless this particular rule is only a necessary application of the single general principle. The circumstances show that there could not possibly be the good faith, knowledge, and free consent required by the principle, and therefore the

confidential relation, the onus of establishing it by proof rests upon the party who has received the gift." In the frequently quoted case of Hatch v. Hatch, 9 Ves. 292, Lord Eldon said: "This case proves the wisdom of the court in saying that it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty." In Smith v. Kay, 7 H. L. Cas. 750, Lord Kingsdowne said, the equitable principle applied in all transactions where "influence has been acquired and abused, in which confidence has been reposed and betrayed." Lord Cranworth also said that the familiar cases of parent and child, guardian and ward, attorney and client, are only instances of a broad and widely applicable principle. See, also, Bennett v. Austin, 81 N. Y. 308, 332, 333, *per* Rapallo, J.; Young v. Hughes, 32 N. J. Eq. 372; Emigrant Co. v. County of Wright, 7 Otto, 339; Huguenin v. Baseley, 14 Ves. 273; 2 Eq. Lead. Cas. 1156, 1174, 1192 (4th Am. ed.)

result which is a rebuttable presumption in the first class of transactions, becomes a conclusive presumption in the second. The transactions belonging to the first class may be gifts or agreements and conveyances upon valuable consideration. The principle is applied with great emphasis and rigor to gifts, whether they are simple bounties, or purport to be the effects of liberality based upon antecedent favors and obligations.[1] Contracts, executory or executed, made upon a valuable consideration, are not, perhaps, scrutinized with quite so much severity as gifts, but they are subjected to the operation of the same principle, and must conform to its requirements.[2] Having thus explained the general nature and scope of the principle, I shall now describe its application to the most important and familiar forms of fiduciary relations, and its effects upon the rights and liabilities of the parties thereto.

§ 958. **Trustee and Beneficiary.**—As the general powers, duties, and liabilities of trustees will be more fully discussed in a subsequent chapter, I shall at present simply state in the briefest manner those rules, growing out of the fiduciary relation, which regulate their dealings with their beneficiaries.[3] In the first place, when the trustee deals with the trust property, but not directly with the *cestui que trust*, and without the latter's intervention. The rule is inflexibly established that where in the management and performance of the trust, trust property

[1] Huguenin v. Baseley, 14 Ves. 273; 2 Eq. Lead. Cas. 1156, 1174, 1192; Fulham v. McCarthy, 1 H. L. Cas. 703; Savery v. King, 5 H. L. Cas. 627; Prideaux v. Lonsdale, 1 De G. J. & S. 433; Wright v. Vanderplank, 8 De G. M & G. 133; Hoghton v. Hoghton, 15 Beav. 278; Broun v. Kennedy, 33 Beav. 133; 4 De G. J. & S. 217; Tomson v. Judge, 3 Drew, 306; Morgan v. Minett, L. R., 6 Ch. D. 638 and cases cited. Lyon v. Home, L. R., 6 Eq. 655; Everitt v. Everitt, Id., 10 Eq. 405; Turner v. Collins, Id., 7 Ch. 329; Rhodes v. Bate, Id., 1 Ch. 252; Brock v. Barnes, 40 Barb. 521; Wistar's Appeal, 54 Pa. St. 60; Greenfield's Estate, 2 Harris, 489, 507; Todd v. Grove, 33 Md. 188; Turner v. Turner, 44 Mo. 535; Taylor v. Taylor, 8 How. (U. S.) 183; Jenkins v. Pye, 12 Pet. 241, 253; and see Falk v. Turner, 101 Mass. 494. Testamentary gifts stand upon a somewhat different footing: that is, they *may* be valid, while a gift *inter vivos* between the same parties might be void: Hindson v. Weatherill, 5 De G. M. & G. 301.

[2] Huguenin v. Baseley, 2 Eq. Lead. Cas. 1156, 1174, 1192; Fox v. Mackreth, 2 Bro. Ch. 400; 2 Cox, 320; 1 Eq. Lead. Cas. 188, 212, 237; Gibson v. Jeyes, 6 Ves. 266; Hatch v. Hatch, 9 Ves. 292; Griffiths v. Robins, 3 Madd. 191; Revett v. Harvey, 1 S. & S. 502; Cary v. Cary, 2 Sch. & Lef. 173; Gresley v. Mousley, 4 De G. & J. 78; 3 De G. F. &. J. 433; Edwards v. Meyrick, 2 Hare, 60; Tate v. Williamson, L. R., 2 Ch. 55; 1 Eq. 528; Young v. Hughes, 32 N. J. Eq. 372; Kline v. Kline, 57 Pa. St. 120; Norris v. Tayloe, 49 Ill. 17; Rockafellow v. Newcomb, 57 Ill. 186; Turner v. Turner, 44 Mo. 535; Bayliss v. Williams, 6 Cold. 440; McCormick v. Malin, 5 Blackf. 509; Harkness v. Fraser, 12 Flor. 336, 341.

[3] See Huguenin v. Baseley, 2 Eq. Lead. Cas. 1156, 1180, 1228; Fox v. Mackreth, 1 Id. 188, 212, 237 (4th Am. ed.)

of any description, real or personal property, or mercantile assets, is sold, the trustee can not, without the knowledge and consent of the *cestui que trust*, directly or indirectly become the purchaser. Such a purchase is always voidable, and will be set aside on behalf of the beneficiary, unless he has affirmed it being *sui juris* after obtaining full knowledge of all the facts. It is entirely immaterial to the existence and operation of this rule, that the sale is intrinsically a fair one, that no undue advantage is obtained, or that a full consideration is paid, or even that the price is the highest which could be obtained. The policy of equity is to remove every possible *temptation* from the trustee. The rule also applies alike where the sale is private, or at auction, where the purchase is made directly by the trustee himself, or indirectly through an agent, where the trustee acts simply as agent for another person, and where the purchase is made from a co-trustee. Finally, the rule extends with equal force to a purchase, made under like circumstances by a trustee from himself. A trustee acting in his fiduciary character, and without the intervention of the beneficiary, can not sell the trust property to himself, nor buy his own property from himself for the purposes of the trust.[1] In the second place, where

[1] Fox v. Mackreth, 1 Eq. Lead. Cas. 188, 212, 237 (4th Am. ed.); Lewis v. Hillman, 3 H. L. Cas. 607; Hamilton v. Wright, 9 Cl. & Fin. 111; Aberdeen R'y Co. v. Blaikie, 1 Macq. 461; *In re* Bloye's Trust, 1 Macn. & G. 488; Knight v. Majoribanks, 2 Id. 10; Parkinson v. Hanbury, 2 De G. J. & S. 450; Ingle v. Richards, 6 Jur., N. S., 1178; Ridley v. Ridley, 34 L. J. Ch. 462; Franks v. Bollans, 37 Id. 148, 155; Grover v. Hugell, 3 Russ. 428; Gregory v. Gregory, Coop. 201; Baker v. Carter, 1 Y. & C. 250; Woodhouse v. Meredith, 1 J. & W. 204, 222; *Ex parte* Lacey, 6 Ves. 625; *Ex parte* James, 8 Id. 337, 348; *Ex parte* Bennett, 10 Id. 381, 394; Randall v. Errington, Id. 423; Att'y Gen. v. Earl of Clarendon, 17 Id. 491, 500; Tracy v. Colby, 55 Cal. 67; Tracy v. Craig, Id. 91; Scott v. Umbarger, 41 Id. 410; Union Slate Co. v. Tilton, 69 Me. 244; Connolly v. Hammond, 51 Tex. 635; Paine v. Irwin, 16 Hun, 390; Michoud v. Girod, 4 How. (U. S.) 503; Stephen v. Beall, 22 Wall. 329; Wormley v. Wormley, 8 Wheat. 421; Caldwell v. Taggart, 4 Pet. 190; Freeman v. Harwood, 44 Me. 195; Dyer v. Shurtleff, 112 Mass. 165; Brown v. Cowell, 116 Id. 461; Smith v. Frost, 70 N. Y. 65; Fulton v. Whitney, 66 Id. 548; Star Fire Ins. Co. v. Palmer, 41 N. Y. Supr. Ct. 267; Woodruff v. Boyden, 3 Abb. N. C. 29; De Caters v. Le Ray de Chaumont, 3 Paige, 178; Child v. Brace, 4 Id. 309; Campbell v. Johnston, 1 Sandf. Ch. 148; Cram v. Mitchell, Id. 251; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Johnson v. Bennett, 39 Id. 237; Romaine v. Hendrickson, 27 N. J. Eq. 162 (see this case for an accurate statement of the rule and its reasons); Wakeman v. Dodd, 27 N. J. Eq. 564; McGinn v. Shaeffer, 7 Watts. 412; Mason v. Martin, 4 Md. 124; Wasson v. English, 13 Mo. 176; Ringgold v. Ringgold, 1 Har. & G. 11; Brothers v. Brothers, 7 Ired. Eq. 150; McCants v. Bee, 1 McCord Eq. 383; James v. James, 55 Ala. 525; Narcissa v. Wathan, 2 B. Mon. 241; Higgins v. Curtiss, 82 Ill. 28; Bush v. Sherman, 80 Id. 160; Munn v. Burges, 70 Id. 604; Roberts v. Moseley, 64 Mo. 507; Schwarz v. Wendell, Walker Ch. 267. *Purchase at auction.*—Adams v. Sworder, 2 De G. J. & S. 44; Grover v. Hugell, 3 Russ. 428; Lawrance v. Galsworthy, 3 Jur., N. S., 1049; Sanderson v. Walker, 13 Ves. 601; *Ex parte* Bennett, 10 Id. 381, 393; Campbell v. Walker, 5 Id.

the trustee deals, with respect to the trust, directly with his beneficiary. A purchase by a trustee from his *cestui que trust*, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit, is generally voidable and will be set aside on behalf of the beneficiary; it is at least *prima facie* voidable upon the mere facts thus stated.[1] There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show, by unimpeachable and convincing evidence, that the beneficiary being *sui juris* had full information and complete understanding of all the facts concerning the property and the transaction

678; *Ex parte* James, 8 Id. 337, 348; Michoud v. Girod, 4 How. (U. S.) 503; Davoue v. Fanning, 2 Johns. Ch. 252; Bellamy v. Bellamy, 6 Flor. 62. *At judicial sale.*—*Ex parte* Bennett, 10 Ves. 381, 393; Roberts v. Moseley, 64 Mo. 507; Tracy v. Colby, 55 Cal. 67; Tracy v. Craig, Id. 91 (purchase by a probate judge by whom the sale had been ordered, and by whom the sale would in regular course of proceedings be confirmed—a most extraordinary case); Jewett v. Miller, 10 N. Y. 402; Van Epps v. Van Epps, 9 Paige, 237; Fisk v. Sarber, 6 Watts & S. 18. *Purchase made indirectly through a third person.*—Adams v. Sworder, 2 De G. J. & S. 44; Sanderson v. Walker, 13 Ves. 601; Scott v. Umbarger, 41 Cal. 410; James v. James, 55 Ala. 525; Higgins v. Curtiss, 82 Ill. 28; Davoue v. Fanning, 2 Johns. Ch. 252; Beeson v. Beeson, 9 Pa. St. 279; Dorsey v. Dorsey, 3 Har. & J. 410. *Purchase by trustee as agent for a third person.*—*Ex parte* Bennett, 10 Ves. 381; Gregory v. Gregory, Coop. 201; North Balt. etc. Ass'n v. Caldwell, 25 Md. 420. *Purchase from a co-trustee.*—Whichcote v. Lawrence, 3 Ves. 740; Cumberland Coal Co. v. Sherman, 30 Barb. 653; Ringgold v. Ringgold, 1 Har. & G. 11. The rule is also settled, where not abrogated by statute, that an incumbrancer with a power of sale in selling under the power becomes a trustee for the sale, and as such can not directly or through an agent purchase the property. Downes v. Grazebrook, 3 Meriv. 200, *per* Lord Eldon; *In re* Bloye's Trust, 1 Macn. & G. 488, 494, 495; Waters v. Groom, 11 Cl. & Fin. 684; Hyndman v. Hyndman, 19 Vt. 9; Slee v. The Manhattan Co., 1 Paige, 48; Hendricks v. Robinson, 2 Johns. Ch. 283, 311; Dobson v. Racey, 3 Sandf. Ch. 60; Campbell v. McLain, 51 Pa. St. 200; Tennant v. Trenchard, L. R., 4 Ch. 537. Although the purchase be set aside, still if it was fair, the court may allow the trustee for his payments, and advances, and improvements when he acted in good faith. Mulford v. Minch, 3 Stockt. Ch. 16; Mason v. Martin, 4 Md. 124; and see Paine v. Irwin, 16 Hun, 390. After the trust has been completely ended, the former trustee may purchase, Munn v. Burges, 70 Ill. 604; Bush v. Sherman, 80 Id. 160.

[1] In *Ex parte* Lacey, 6 Ves. 625, 627, Lord Eldon gave the practical reason for this stringent rule: "It is founded upon this, that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not." Lloyd v. Attwood, 3 De G. & J. 614; Campbell v. Walker, 5 Ves. 678, 682; 13 Id. 601; Randall v. Errington, 10 Id. 423; Hamilton v. Wright, 9 Cl. & Fin. 111, 123–125; Ingle v. Richards, 28 Beav. 361; Tatum v. McLellan, 50 Miss. 1; Clarke v. Deveaux, 1 S. C. 172, 184; Smith v. Townshend, 27 Md. 368; Spencer & Newbold's Appeal, 80 Pa. St. 317, 332; Parshall's Appeal, 65 Id. 224; Wistar's Appeal, 54 Id. 60; Diller v. Brubacker, 52 Id. 498.

itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might, with reasonable diligence, have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity.[1] The doctrine is enforced with the utmost stringency when the transaction is in the nature of a bounty conferred upon the trustee, a gift or benefit without full consideration. Such a transaction will not be sustained, unless the trust relation was for the time being completely suspended, and the beneficiary acted throughout upon independent advice, and upon the fullest information and knowledge.

§ 959. **Principal and Agent.**—Equity regards and treats this relation in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary. The underlying thought is that an agent should not unite his personal

[1] The independent advice of a third person does not seem to be an essential feature in purchases for a fair consideration; but it does seem to be indispensable in transactions having the nature of gifts, whereby the trustee obtains some benefit, as for example, a release of claims against the trustee given by the *cestui que trust* as a bounty. Lloyd v. Attwood, 3 De G. & J. 614. Some of the cases speak of "terminating the trust," "ceasing to be trustee," "shaking off the character of trustee," and the like. These expressions plainly do not mean that the trust relation should have been finally ended and dissolved. They are especially applicable to transactions in the nature of gifts, and then refer to the independent advice of a third person, upon which the beneficiary acts, so that the trustee is not *pro hac vice* dealing in his capacity of trustee. When applied to purchases the expressions simply mean that the beneficiary must have complete information and unbiased judgment, and must give a free and full consent. The rule given in the text was well stated in the important case of Coles v. Trecothick, 9 Ves. 234, 246. "A trustee may buy from the *cestui que trust* provided there is a clear and distinct contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee." *Ex parte* Bennett, 10 Ves. 381, 394; *Ex parte* Lacey, 6 Id. 625; *Ex parte* James, 8 Id. 337, 348; Morse v. Royal, 12 Id. 355; Randall v. Errington, 10 Id. 423; Downes v. Grazebrook, 3 Meriv. 200, 208; Knight v. Majoribanks, 2 Macn. & G. 10; Luff v. Lord, 11 Jur. N. S. 50; Denton v. Donner, 23 Beav. 285; Ayliffe v. Murray, 2 Atk. 58; Clarke v. Swaile, 2 Eden, 134; Spencer & Newbold's Appeal, 80 Pa. St. 317; Villines v. Norfleet, 2 Dev. Eq. 167; Bryan v. Duncan, 11 Geo. 67; Kennedy v. Kennedy, 2 Ala. 571; Richardson v. Spencer, 18 B. Mon. 450; Marshall v. Stephens, 8 Humph. 159; Sallee v. Chandler, 26 Mo. 124.

and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal, and with the duties which he owes to his principal.[1] In dealings without the intervention of his principal, if an agent for the purpose of selling property of the principal purchases it himself, or an agent for the purpose of buying property for the principal buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage and other similar features are wholly immaterial; nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts.[2] Passing to dealings connected with the

[1] Neuendorff v. World etc. Ins. Co., 69 N. Y. 389; Wilbur v. Lynde, 49 Cal. 290; Tynes v. Grimstead, 1 Tenn. Ch. 508; Dodd v. Wakeman, 26 N. J. Eq. 484; Krutz v. Fisher, 8 Kans. 90; Fisher v. Krutz, 9 Id. 501; Grumley v. Webb, 44 Mo. 444. For the same reason, an agent can not, unless expressly authorized by both, act as such for two principals whose interests are conflicting; a contract thus made without the knowledge and consent of each, would not be enforced, and might be canceled. N. Y. Cent. Ins. Co. v. Nat. Protect. Ins. Co., 14 N. Y. 85; Greenwood v. Spring, 54 Barb. 375; Lloyd v. Colston, 5 Bush, 587; Draughon v. Quillen, 23 La. An. 237; Scribner v. Collar, 40 Mich. 375.

[2] As in the case of trustees this rule applies alike to private sales, auction sales, and judicial sales. *In re* Bloye's Trust, 1 Macn. & G. 488, 495; Walsham v. Stainton, 1 De G. J. & S. 678; Kimber v. Barber, L. R., 8 Ch. 56; Lewis v. Hillman, 3 H. L. Cas. 607; Tyrrell v. Bank of London, 10 Id. 26; Charter v. Trevelyan, 11 Cl. & Fin. 714; *Ex parte* Gore, 6 Jur. 1118; 7 Id. 136; Hichens v. Congreve, 4 Russ. 562, 577; Taylor v. Salmon, 4 My. & Cr. 134; Gillett v. Peppercorne, 3 Beav. 78; Lowther v. Lowther, 13 Ves. 95, 103; Murphy v. O'Shea, 2 Jo. & Lat. 422; East India Co. v. Henchman, 1 Ves. 287; Massey v. Davies, 2 Ves. 317; Bentley v. Craven, 18 Beav. 75; Barker v. Harrison, 2 Coll. 546; Lees v. Nuttall, 2 My. & K. 819; also, agent to settle a debt of his principal can not purchase it, or any security of it, for his own benefit. Carter v. Palmer, 8 Cl. & Fin. 657; 11 Bligh, N. S., 397; Cane v. Lord Allen, 2 Dow, 289, 294; Reed v. Norris, 2 My. & Cr. 361; Hobday v. Peters, 28 Beav. 349; Neuendorff v. World etc. Ins. Co., 69 N. Y. 389; Bain v. Brown, 56 Id. 285; Taussig v. Hart, 49 Id. 301; Bennett v. Austin, 81 Id. 308; Conkey v. Bond, 36 Id. 427; 34 Barb. 276; Gardner v. Ogden, 22 Id. 327 (subagent); Moore v. Moore, 5 Id. 256; Dobson v. Racey, 8 Id 216 (ratified); Bank of Orleans v. Torrey, 7 Hill, 260; 9 Paige, 649, 662; Bridenbacker v Lowell, 32 Barb. 9; Davoue v. Fanning, 2 Johns. Ch. 252; Van Epps v. Van Epps, 9 Paige, 237; Hughes v. Washington, 72 Ill. 84; Tewksbury v. Spruance, 75 Id. 187; Eldridge v. Walker, 60 Id. 230; Jeffries v. Wiester, 2 Sawy. 135; Wilbur v. Lynde, 49 Cal. 290; Rubidoex v. Parks, 48 Id. 215; Hardenbergh v. Bacon, 33 Id. 356, 377; Hunsacker v. Sturgis, 29 Id. 142, 145; Armstrong v. Elliott, 29 Mich. 485; Ruckman v. Bergholz, 37 N. J. L. 437; Tynes v. Grimstead, 1 Tenn. Ch. 508; Barziza v. Story, 39 Tex. 354; Rogers v. Lockett, 28 Ark. 290; Grumley v. Webb, 44 Mo. 444; Baker v. Whiting, 1 Story, 218, 241 (by a subagent); Caldwell v. Sigourney, 19 Conn. 37; Banks v. Judah, 8 Id. 145; Marshall v. Joy, 17 Vt. 546; Ingle v. Hartman, 37 Iowa, 274; Scott v. Freeland, 7 Sm. and Mar. 409; and see many of the American cases, cited under the preceding paragraph, concerning sim-

principal's intervention, in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome; although this presumption is undoubtedly not so weighty and strong as in the case of a trustee. The mere fact that a reasonable consideration is paid and that no undue advantage is taken, is not of itself sufficient. Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal.[1] If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction, and of the person with whom he was dealing, and gave a full and free consent—if all these are affirmatively proved, the presumption is overcome, and the transaction is valid.[2] These

ilar purchases by trustees. In Scott v. Mann, 36 Tex. 157, it seems to be held that an agent to sell property at auction, may bid for it on behalf of a third person. This conclusion is directly opposed to the English decisions, and seems to be plainly opposed to the rule that a person can not act as agent for two principals whose interests are antagonistic.

[1] Walsham v. Stainton, 1 De G. J. & S. 678; Haygarth v. Wearing, L. R., 12 Eq. 320; Donaldson v. Gillot, Id., 3 Id. 274; Panama etc. Tel. Co. v. India Rubber etc. Co., Id., 10 Ch. 515, 526; Tyrrell v. Bank of London, 10 H. L. Cas. 26; Charter v. Trevelyan, 11 Cl. & Fin. 714; Murphy v. O'Shea, 2 Jo. & Lat. 422; Wilson v. Short, 6 Hare, 366, 383; Gillett v. Peppercorne, 3 Beav. 78; Clarke v. Tipping, 9 Id. 282; Hobday v. Peters, 28 Id. 349; Wentworth v. Lloyd, 32 Id. 467; Byrd v. Hughes, 84 Ill. 174; Jeffries v. Wiester, 2 Sawy. 135; Wilbur v. Lynde, 49 Cal. 290; Ingle v. Hartman, 37 Iowa, 274; Rubidoex v. Parks, 48 Cal. 215; Weeks v. Downing, 30 Mich. 4; Uhlich v. Muhlke, 61 Ill. 499; Wilson v. Wilson, 4 Abb. App. Dec. 621; Young v. Hughes, 32 N. J. Eq. 372; Condit v. Blackwell, 22 Id. 481; Comstock v. Comstock, 57 Barb. 453; Norris v. Tayloe, 49 Ill. 17; Green v. Winter, 1 Johns. Ch. 26, 60; Brown v. Post, 1 Hun, 303; Cleveland Ins. Co. v. Reed, 1 Biss. 180; McMahon v. McGraw, 26 Wisc. 614; White v. Ward, 26 Ark. 445; Gillenwaters v. Miller, 49 Miss. 150. In the recent case of Panama etc. Tel. Co. v. India Rubber etc. Co., *supra*, James, L. J., laid down the following general rule: "I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal, is a fraud on such other principal, cognizable in this court. That I believe to be a clear proposition, and I take it to be equally clear that the defrauded principal, if he come in time, is entitled at his option to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him."

[2] Lewis v. Hillman, 3 H. L. Cas. 607; Charter v. Trevelyan, 11 Cl. & Fin. 714, 732; Rothschild v. Brookman, 5 Bligh, N. S., 165; Cane v. Lord Allen, 2 Dow, 289, 294; Lord Selsey v. Rhoades, 1 Bligh, N. S., 1; 2 S. & S. 41; Clarke v. Tipping, 9 Beav. 282; Dally v. Wonham, 33 Id. 154; Lowther v. Lowther, 13 Ves. 95, 103; Woodhouse v. Meredith, 1 J. & W. 204; Watt v. Grove, 2 Sch. & Lef. 492; Molony v. Kernan, 2 Dr. & War. 31; Mulhallen v. Marum, 3 Id. 317; Murphy v. O'Shea, 2 Jo. & Lat. 422, 425; Barker

general doctrines are applied under every variety of circumstances, and to every kind of transaction. As illustrations, when an agent has during his employment discovered a defect in his principal's title, he can not, after the agency is ended, use such knowledge for his own benefit; much less can he do so while the agency exists.[1] Nor is an agent employed to purchase or to sell, or in any other business, permitted to make profits for himself in the transaction, unless by the plain consent of his employer; for all such profits wrongfully made he must account to his principal;[2] and if he has taken the legal title to property in violation of his fiduciary duty, equity will treat him as a trustee thereof for his principal.[3] A gift by a principal to his agent may be valid and be sustained, if the absolute good faith, knowledge, and intent of both the parties is clearly established.[4] After the agency has been ended, and the fiduciary relation has ceased, the foregoing rules no longer operate; the parties may deal with each other in the same manner as any other persons.[5]

v. Harrison, 2 Coll. 546; *In re* Bloye's Trust, 1 Macn. & G. 488; Walker v. Carrington, 74 Ill. 446; Young v. Hughes, 32 N. J. Eq. 372; Wilson v. Wilson, 4 Abb. App. Dec. 621; Brown v. Post, 1 Hun, 303; Farnam v. Brooks, 9 Pick. 212; Marshall v. Joy, 17 Vt. 546; Moore v. Mandlebaum, 8 Mich. 433; Fisher's Appeal, 34 Pa. St. 29; and see cases in last preceding note.

[1] One of the most common instances of such conduct is the agent's acquiring a tax title to his principal's property for his own benefit; this proceeding is always invalid. Ringo v. Binns, 10 Pet. 269; Rogers v. Lockett, 28 Ark. 290; Krutz v. Fisher, 8 Kans. 90; Fisher v. Krutz, 9 Id. 501; McMahon v. McGraw, 26 Wisc. 614.

[2] De Bussche v. Alt, L. R., 8 Ch. D. 286; Imperial etc. Ass'n v. Coleman, Id., 6 H. L. 189; Tyrrell v. Bank of London, 10 H. L. Cas. 26, 39; Walsham v. Stainton, 1 De G. J. & S. 678; East I. Co. v. Henchman, 1 Ves. 287; Massey v. Davis, 2 Id. 317; *Ex parte* Hughes, 6 Id. 617; Benson v. Heathorn, 1 Y. & C. 326, 342; Beck v. Kantorowicz, 3 K. & J. 230; Bentley v. Craven, 18 Beav. 75; Maxwell v. Port Tenant etc. Co., 24 Id. 495; Ritchie v. Couper, 28 Id. 344; Moinett v. Days, 1 Baxt. 431; Dodd v. Wakeman, 26 N. J. Eq. 484; Coursin's Appeal, 79 Pa. St. 220; Wilson v. Wilson, 4 Abb. App. Dec. 621; Gillenwaters v. Miller, 49 Miss. 150; Taussig v. Hart, 49 N. Y. 301; Grumley v. Webb, 44 Mo. 444; Leake v. Sutherland, 25 Ark. 219; Bunker v. Miles, 30 Me. 431; Church v. Sterling, 16 Conn. 388; Reed v. Warner, 5 Paige, 650; Bruce v. Davenport, 36 Barb. 349; Gardner v. Ogden, 22 N. Y. 327; Myers' Appeal, 2 Barr, 463; Keighler v. Savage Man. Co., 12 Md. 383; Kanada v. North, 14 Mo. 615; Knabe v. Ternot, 16 La. An. 13.

[3] Reitz v. Reitz, 80 N. Y. 538; Bennett v. Austin, 81 Id. 308; Gardner v. Ogden, 22 Id. 327; Smith v. Stephenson, 45 Iowa, 645; Barziza v. Story, 39 Tex. 354; Krutz v. Fisher, 8 Kans. 90; Fisher v. Krutz, 9 Id. 501; McMahon v. McGraw, 26 Wisc. 614; Matthews v. Light, 32 Me. 305; Pillsbury v. Pillsbury, 17 Id. 107; Church v. Sterling, 16 Conn. 388; Parkist v. Alexander, 1 Johns. Ch. 394; Burrell v. Bull, 3 Sandf. Ch. 15; Blount v. Robeson, 3 Jones Eq. 73; Hargrave v. King, 5 Ired. Eq. 430; Wellford v. Chancellor, 5 Gratt. 39; McKinley v. Irvine, 13 Ala. 681; Moore v. Mandlebaum, 8 Mich. 433; Massie v. Watts, 6 Cranch, 148; see *post*, Constructive Trusts.

[4] The equitable rule concerning gifts between principal and agent does not seem to be as stringent as that which regulates the similar dealings of trustees and their beneficiaries. Hunter v. Atkins, 3 My. & K. 113; Nicol v. Vaughan, 1 Cl. & Fin. 495; Hobday v. Peters, 28 Beav. 349.

[5] Scott v. Dunbar, 1 Moll. 442;

§ 960. **Attorney and Client.**—The courts of England have uniformly watched all the dealings between attorneys or barristers and their clients with the closest scrutiny, and have established very rigorous rules concerning them. It must be conceded that this equitable doctrine has been, to a considerable extent, ignored, and these rules have been greatly modified in their application, by the courts in several of the American states. While the fact must be admitted, it can not be too much deplored.[1] In regard to gifts, the rule is definitely settled, although it may not *always* have been followed by American courts, that no gift from a client to his attorney, made while the relation is still subsisting, is valid. In order that a gift from a client to his own attorney may be sustained, the donee must not only show *affirmatively* the perfect good faith of the transaction, the absence of any pressure or influence on his own part, the complete knowledge, intention, consent, and freedom of action on the donor's part, but it must also appear that *pro hac re*—that is, in all the dealings connected with the gift itself—the relation of attorney and client between the two parties had been suspended, by means of independent advice furnished to the client by some disinterested and competent third person, through which the client was instructed and upon which he acted. Whatever may be the other circumstances, unless it be shown that the client, in conferring his bounty, had the benefit of such independent counsel and advice, the gift must fail.[2] In regard to pur-

Trevelyan v. Charter, 4 L. J. Ch. 209; Bucher v. Bucher, 86 Ill. 377. Even then, however, a former agent is not permitted to use special knowledge which he acquired by means of his agency, to benefit himself at the expense of the former principal. Carter v. Palmer, 8 Cl. & Fin. 657; Holman v. Loynes, 4 De G. M. & G. 270.

[1] I venture the suggestion that no single circumstance has done more to debase the practice of the law in the popular estimation, and even to lower the lofty standard of professional ethics and self-respect among members of the legal profession itself, in large portions of our country, than the nature of the transactions, often in the highest degree champertous, between attorney and client, which are permitted, and which have received judicial sanction. It sometimes would seem that the fiduciary relation and the opportunity for undue influence, instead of being the grounds for invalidating such agreements, are practically regarded rather as their excuse and justification.

[2] The language, "the relation must have terminated," or "must have ceased to exist," etc., is found in some of the cases. This does not mean that the business connection between the donor and the donee must have been fully and finally ended, and the attorney discharged entirely from his employment. It simply means, as stated in the text, that in the dealing concerning the gift itself, the attorney must not be acting *as* attorney for the client, but some other attorney or competent adviser must be called in. The rule, as given in the text, is firmly established in England. The latest decision is Morgan v. Minett, L. R., 6 Ch. D. 638. A client had given three releases and conveyances to Minett, who had long been his confidential attorney and friend. The evidence showed, beyond a question, that the donor fully knew and comprehended the nature of the transac-

chases, sales, and other similar contracts between the attorney and client, the rule is not so stringent. Such species of contract made while the relation is still subsisting may be valid, and independent advice to the client from a third person is never essential, although very proper. The presumption always arises against the validity of a purchase or sale between the client and attorney made during the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice; in the language of Lord Eldon, "the

tion, and intended to confer the bounty. The donor, however, had no other adviser in the transaction, and counseled with no one except the donee, Minett. The gift was declared invalid and the instruments canceled. The court said (p. 645): "The law I take to be as plainly settled on the subject as any law existing in this country, that while the relation of solicitor and client subsists, the solicitor can not take a gift from his client" * * * (p. 646): "It is not said that the relation prevents a client bestowing his bounty upon his solicitor, but what the law requires is that, considering the enormous influence which a solicitor in many cases must have over his client, in order to give validity and effect to a donation from a client to his solicitor, that relation must be severed. The parties must be, as one of the cases says, at arm's length. The relation must have ceased to exist. If that can once be established, there is an end to the influence; whatever the influence may have been before need not be inquired into; the influence does not exist where that state of circumstances is brought about, and then the client may as well give to the solicitor as give to any other person. The degree of influence need not be inquired into. The fact of the influence is enough if it be established. You can not inquire how much influence there was; it is enough, in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused; and the rule is not a hard one upon a solicitor. A client inclined to bestow bounty upon his solicitor is at perfect liberty to do it, and the solicitor is at perfect liberty to accept it, but both of them must act under circumstances which preclude the possibility of suspicion, for suspicion is enough." The court reviewed the prior cases, and especially the often quoted case of Hunter v. Atkins, 3 My. & K. 113, in which Lord Brougham argued that a gift to an attorney stood on the same footing as a purchase by him. These views of Lord Brougham were mere *dicta* and had been often criticised and repudiated, and were opposed to the whole current of authority. The correctness of the rule laid down in Tomson v. Judge, 3 Drew. 306, was expressly affirmed. See also Broun v. Kennedy, 4 De G. J. & S. 217; Middleton v. Welles, 1 Cox, 112; 4 Bro. P. C. 245; Hatch v. Hatch, 9 Ves. 292; Lady Ormond v. Hutchinson, 13 Ves. 47; Wright v. Proud, Id. 136; Montesquieu v. Sandys, 18 Id. 302; *In re* Holmes' Estate, 3 Giff. 337, 345; Gibbs v. Daniel, 4 Giff. 1; O'Brien v. Lewis, Id. 221; Wood v. Downes, 18 Ves. 120; Goddard v. Carlisle, 9 Price, 169; Greenfield's Estate, 2 Harris, 489, 506; and see Berrien v. McLane, 1 Hoff. Ch. 421; Brock v. Barnes, 40 Barb. 521. In Nesbit v. Lockman, 34 N. Y. 167, while the general rule was admitted, a gift to a managing clerk of the donor's attorney was sustained upon the particular circumstances. A distinction exists between gifts *inter vivos* and testamentary gifts. A bequest to the testator's attorney will be held valid, even where the attorney himself drew up the will, if the testator's capacity and freedom of action and intent be shown; Hindson v. Weatherill, 5 De G. M. & G. 301; Walker v. Smith, 29 Beav. 394; Raworth v. Marriott, 1 My. & K. 643.

attorney must prove that his diligence to do the best for his vendor has been as great as if he was only an attorney dealing for that vendor with a stranger."[1] If all these circumstances are proved the contract will stand; if not it will be defeated or set aside.[2] In the conduct of his employment the attorney must consult his client's interests in preference to his own. He is not permitted, therefore, to make any profit out of the employment other than his due compensation, except with the knowledge and consent of his client; for all such profits he must

[1] Gibson v. Jeyes, 6 Ves. 266, 271.

[2] In Edwards v. Meyrick, 2 Hare, 60, the doctrine was fully discussed in all its bearings by Wigram, V. C., and a purchase by an attorney was sustained, although it turned out to be much more profitable than was anticipated. The following recent English decisions furnish striking illustrations of the rule. *Cases in which the transaction was held invalid.*—Holman v. Loynes, 4 De G. M. & G. 270; Hesse v. Briant, 6 Id. 623; Broun v. Kennedy, 4 De G. J. & S. 217; Gresley v. Mousley, 4 De G. & J. 78, 91, 94, 95, 98, 99; 3 De G. F. & J. 433 (a very remarkable case; a purchase set aside after death of both parties, on ground of undervalue, and by application of the presumption, there being no affirmative evidence to sustain the validity); Lyddon v. Moss, 4 De G. & J. 104; Baker v. Loader, L. R., 16 Eq. 49; Prees v. Coke, L. R., 6 Ch. 645 (conveyance by a mortgagor to the mortgagee who was also his attorney, set aside merely from absence of evidence overcoming the presumption); Lee v. Angas, L. R., 7 Ch. 79, n. *Transactions held valid.* Moss v. Bainbrigge, 6 De G. M. & G. 292; Johnson v. Fesemeyer, 3 De G. & J. 13, 22 (the doctrine does not apply when the attorney is in the hostile attitude of an urgent creditor seeking payment or security); Lyddon v. Moss, 4 De G. & J. 104 (delay and acquiescence); Blagrave v. Routh, 2 K. & J. 509; Clanricarde v. Heuning, 30 Beav. 175. See also on the general rule, Gibson v. Jeyes, 6 Ves. 266, 277; Montesquieu v. Sandys, 18 Id. 302; Newman v. Payne, 2 Id. 200; Hatch v. Hatch, 9 Id. 292; Walmesley v. Booth, 2 Atk. 25; Welles v. Middleton, 1 Cox, 112; Savery v. King, 5 H. L. Cas. 627; Cane v. Lord Allen, 2 Dow, 289; Morgan v. Lewes, 4 Id. 29, 47; Uppington v. Bullen, 2 Dr. & War. 185; Higgins v. Joyce, 2 Jo. & Lat. 282; Spencer v. Topham, 22 Beav. 573; Pearson v. Benson 28 Id. 598; Adams v. Sworder, 2 De G. J. & S. 44. The American cases do not exhibit so much uniformity. While all recognize the general rule, theoretically at least, and while some apply it with firmness and rigor, others have virtually emasculated it in its application. Transactions have been sustained, which an English court would hardly suffer to be discussed, and would visit the attorneys engaged in them with the severest censure. *Cases applying the rules.*—Ryan v. Ashton, 42 Iowa, 365; Broyles v. Arnold, 11 Heisk. 484; Baker v. Humphrey, 11 Otto, 494; Polson v. Young, 37 Iowa, 196; Dunn v. Record, 63 Me. 17 (rule fully adopted); Roman v. Mali, 42 Md. 513 (ditto); Kisling v. Shaw, 33 Cal. 425 (ditto); Haight v. Moore, 37 N. Y. Supr. Ct. 161; McMahan v. Smith, 6 Heisk. 167; Trotter v. Smith, 59 Ill. 240; Mason v. Ring, 3 Abb. App. Dec. 219; Zeigler v. Hughes, 55 Ill. 288; Payne v. Avery, 21 Mich. 524; White v. Whaley, 3 Lans. 327; 40 How. Pr. 353; Mott v. Harrington, 12 Vt. 199; Merritt v. Lambert, 10 Paige, 352; 2 Denio, 607; Howell v. Ransom, 11 Paige, 538; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Brock v. Barnes, 40 Barb. 521; Smith v. Brotherline, 62 Pa. St. 461; Miles v. Ervin, 1 McCord Eq. 524; Brown v. Bulkley, 1 McCarter, 451. *Transactions held valid.*—Porter v. Parmly, 39 N. Y. Supr. Ct. 219; Marsh v. Whitmore, 21 Wall. 178 (delay of twelve years); Jenkins v. Einstein, 3 Biss. 128 (to set aside a conveyance by a person pecuniarily embarrassed to his attorney, it must be shown that the latter had been consulted in regard to the transaction, or was in a position to take an unfair advantage). This seems to reverse the presumption.

account, and if necessary will be treated as a trustee.[1] When an attorney has the charge of, or is employed to conduct, a judicial sale of property, he can not become the purchaser without full explanation and information given to his client of his intention.[2] The English rules concerning compensation, and agreements with respect to payment or security of compensation are exceedingly strict, but they have been relaxed in many if not all of the American states.[3] All of the foregoing rules

[1] This general rule is recognized by all the cases, but there is some difference of decision as to what acts, such as purchases, of the attorney are prohibited by it. It results from the same general doctrine that in contested matters the same attorney can not act on behalf of two opposing parties; and even when he may thus act for two parties in uncontested matters his conduct is most carefully watched, and must exhibit the most perfect good faith; he can not prejudice one client for the benefit of another; the injured client will be relieved by setting aside such a transaction. *As to making a profit, etc.*, see Tyrrell v. B'k of London, 10 H. L. Cas. 26, 44; Rhodes v. Beauvoir, 6 Bligh, 195; Lawless v. Mansfield, 1 Dr. & War. 557, 631; Wood v. Downes, 18 Ves. 120; Proctor v. Robinson, 35 Beav. 329, 335; O'Brien v. Lewis, 4 Giff. 221; Gott v. Brigham, 41 Mich. 227; McDowell v. Milroy, 69 Ill. 498; Wheeler v. Willard, 44 Vt. 640; Harper v. Perry, 28 Iowa, 57; Hatch v. Fogerty, 10 Abb. Pr., N. S., 147; 40 How. Pr. 492 (using information afterwards); Davis v. Smith, 43 Vt. 269. Making profits by purchasing property of client, or in which client is interested; purchase generally held voidable, or in trust for the client, Smith v. Brotherline 62 Pa. St. 461; Wheeler v. Willard, 44 Vt. 640; Porter v. Peckham, 44 Cal. 204 (purchase held valid); *In re* Taylor Orphan Asylum, 36 Wisc. 534; Bowers v. Virden, 56 Miss. 595 (valid); Wright v. Walker, 30 Ark. 44. Acting for two parties and making a contract in violation of his duty to one of them.—Hesse v. Briant, 6 De G. M. & G. 623; Lee v. Angas, L. R., 7 Ch. 79, n.; Baker v. Humphrey 11 Otto, 494. Acting for opposing litigants.—Wallace v. Furber, 62 Ind. 103; De Celis v. Brunson, 53 Cal. 372; Orr v. Tanner, 12 R. I. 94; MacDonald v. Wagner, 5 Mo. App. 56.

[2] This rule seems to be settled by the English decisions, and is followed by some, but not by all, of the American cases. *In re* Bloye's Trust, 1 Macn. & G. 488; Watt v. Grove, 2 Sch. & Lef. 492; Lowther v. Lowther, 13 Ves. 95; Oliver v. Court, 8 Price, 127; Manning v. Hayden, 5 Sawy. 360; Bowers v. Virden, 56 Miss. 595; Pacific R. R. v. Ketchum, 11 Otto, 289; Page v. Stubbs, 39 Iowa, 537; Barrett v. Bamber, 9 Phila. 202; *In re* Taylor Orphan Asylum, 36 Wisc. 534; Taylor v. Boardman, 24 Mich. 287; Warren v. Hawkins, 49 Mo. 137; Banks v. Judah, 8 Conn. 145, 146, 147; Phillips v. Belding, 2 Edw. Ch. 15; Reed v. Warner, 5 Paige, 650; Casey v. Casey, 14 Ill. 412; Sypher v. McHenry, 18 Iowa, 232; Church v. Mar. Ins. Co., 1 Mason, 341, 344; Baker v. Whiting, 3 Sumn. 475.

[3] An attorney who advances money to his client and takes security for it, must have some evidence of the fact more than the security itself and any acknowledgment of payment contained in it. Gresley v. Mousley, 3 De G. F. & J. 433; Morgan v. Lewes, 4 Dow, 29, 46; Morgan v. Evans, 3 Cl. & Fin. 159, 195; Lawless v. Mansfield, 1 Dr. & War. 557. An agreement to pay a gross sum for past services *may* be valid, although the clearest proof of good faith will be required. Morgan v. Higgins, 1 Giff. 270, 277; Welles v. Middleton, 1 Cox, 112, 125; Cheslyn v. Dalby, 2 Y. & C. 170; but an agreement to pay a gross sum for future services, and security given for the compensation with respect to future services, or money to be advanced in future were entirely invalid prior to a recent statute of parliament. *In re* Newman, 30 Beav. 196; Jones v. Tripp, Jacob, 322; Uppington v. Bullen, 2 Dr. & War. 184. The cases are numerous in which settlements, payments, and securities have been set aside at the suit of the client because the attorney's bills of costs were not properly taxed, or examined, or dealt

apply not only to those who are technically attorneys, but also to all who *de facto* act as professional or legal advisers.[1]

§ 961. **Guardian and Ward.**—The equitable rules concerning dealings between guardian and ward are very stringent. The relation is so intimate, the dependence so complete, the influence so great, that any transactions between the two parties, or by the guardian alone, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest degree suspicious; the presumption against them is so strong that it is hardly possible for them to be sustained. Indeed, many authorities lay down the positive rule that the parties are wholly incapacitated from contracting, and that any such transaction between them is necessarily voidable. This statement is perhaps too broad.[2] A will by the ward in his guardian's favor is not viewed so strictly; the presumption against it may be overcome and the will sustained.[3] The general doctrine of equity applies

with as required by law. In the United States attorneys and clients are generally permitted to make what agreements they please concerning compensation for future or past services, even though the agreement would be void at common law for champerty. The courts will, of course, scrutinize such transactions, to see that there was no actual undue influence, that the client acted with knowledge and intentionally; but these facts being established the transaction will rarely be impeached on account of its subject-matter and provisions. Ryan v. Ashton, 42 Iowa, 365; Ballard v. Carr, 48 Cal. 74; Hoffman v. Vallejo, 45 Cal. 564.

[1] To counsel or barristers as distinct from attorneys. Broun v. Kennedy, 4 De G. J. & S. 217; 33 Beav. 133; Carter v. Palmer, 8 Cl. & Fin. 657, 707; MacCabe v. Hussey, 5 Bligh, N. S. 715; Purcell v. McNamara, 14 Ves. 91; to a clerk of an attorney, Hobday v. Peters, 28 Beav. 349; Nesbitt v. Berridge, 32 Id. 282; Nesbit v. Lockman, 34 N. Y. 167; Poillon v. Martin, 1 Sandf. Ch. 569; and even to a friend who has assumed to advise in legal matters, and thus to take the place of an attorney. Tate v. Williamson, L. R., 1 Eq. 528; 2 Ch. 55. There are many other rules of law regulating the relation of attorney and client, but the foregoing are all of the most important ones which can come within the cognizance of equity; courts of equity can generally deal only with contracts and similar transactions between an attorney and client.

[2] Hylton v. Hylton, 2 Ves. Sen. 548, 549; Hatch v. Hatch, 9 Ves. 292; Dawson v. Massey, 1 Ball. & B. 219, 226; Mulhallen v. Marum, 3 Dr. & War. 317; Beasley v. Magrath, 2 Sch. & Lef. 35; Archer v. Hudson, 15 L. J. Ch. 211; Everitt v. Everitt, L. R., 10 Eq. 405; Walker v. Walker, 101 Mass. 169; Gallatian v. Cunningham, 8 Cow. 361; Gallatian v. Erwin, 1 Hopk. 48; White v. Parker, 8 Barb. 48; Henrioid v. Neusbaumer, 69 Mo. 96; Scott v. Freeland, 7 Sm. & Mar. 409; Sullivan v. Blackwell, 28 Miss. 737; Meek v. Perry, 36 Id. 190; Wright v. Arnold, 14 B. Mon. 513; Hanna v. Spotts, 5 Id. 362; Blackmore v. Shelby, 8 Humph. 439; Williams v. Powell, 1 Ired. Eq. 460; Love v. Lea, 2 Ired. Eq. 627; Waller v. Armistead, 2 Leigh, 11; and see Smith v. Davis, 49 Md. 470. The doctrine applies to purchase made by guardians of ward's property when sold by order of court, or at other judicial or public sales; such purchases are generally held voidable, and are clearly so in principle. Redd v. Jones, 30 Gratt. 123; Sanders v. Forgasson, 59 Tenn. 249; Green v. Green, 14 N. Y. Sup. Ct. 492; Walker v. Walker, 101 Mass. 169; Bland v. Lloyd, 24 La. An. 603; but see Doe v. Hassell, 68 N. C. 213; Lee v. Howell, 69 Id. 200; Small v. Small, 74 Id. 16.

[3] Daniel v. Hill, 52 Ala. 430 (a very instructive case, in which the equi-

to the parties after the legal condition of guardianship has ended, and as long as the dependence on one side and influence on the other presumptively or in fact continue. This influence is presumed to last while the guardian's functions are to any extent still performed, while the property is still at all under his control, and until the accounts have been finally settled. It follows, therefore, that any conveyance, purchase, sale, contract, and especially gift by which the guardian derives a benefit, made after the termination of the legal relation, but while the influence lasts, is presumed to be invalid and voidable. The burden rests heavily upon the guardian to prove all the circumstances of knowledge, free consent, good faith, absence of influence, which alone can overcome the presumption.[1] If the legal relation has ended, and all these circumstances of good faith, full knowledge, and free consent are clearly shown, a settlement, conveyance, contract, or even gift from the former ward to his recent guardian, will be as valid and as effective as the same transactions between any other competent persons.[2] It is not essential that a *legal* guardianship should exist; the doctrine applies wherever the relation subsists in fact.[3]

table doctrine was well stated, and the will was held valid); Garvin's Adm'r v. Williams, 50 Mo. 206; Meek v. Perry, 36 Miss. 190.

[1] Hylton v. Hylton, 2 Ves. Sen. 548, 549; Hatch v. Hatch, 9 Ves. 292; Pierce v. Waring, 1 P. Wms. 121 n.; Dawson v. Massey, 1 Ball & B. 219; Cary v. Cary, 2 Sch. & Lef. 173; Revett v. Harvey, 1 S. & S. 502; Mellish v. Mellish, Id. 138; Maitland v. Backhouse, 16 Sim. 58; Maitland v. Irving, 15 Id. 437; Wedderburn v. Wedderburn, 4 My. & Cr. 41; Espey v. Lake, 10 Hare, 260; Matthew v. Brise, 14 Beav. 341, 345; Wright v. Vanderplank, 8 De G. M. & G. 133; 2 K. & J. 1; Wickiser v. Cook, 85 Ill. 68; Tucke v. Bucholz, 43 Iowa, 415; Ranken v. Patton, 65 Mo. 378; Somes v. Skinner, 16 Mass. 348; Fish v. Miller, 1 Hoff. Ch. 267: Rapalje v. Norsworthy, 1 Sandf. Ch. 399; Gale v. Wells, 12 Barb. 84; Eberts v. Eberts, 55 Pa. St. 110; Hawkins's Appeal, 32 Id. 263; Wills' Appeal, 10 Harris, 325, 332; Sherry v. Sansberry, 3 Ind. 320; Waller v. Armistead, 2 Leigh, 11; Williams v. Powell, 1 Ired. Eq. 460; Womack v. Austin, 1 S. C. 421; Andrews v. Jones, 10 Ala. 400; Johnson v. Johnson, 5 Ala. 90; Richardson v. Linney, 7 B. Mon. 571; Wright v. Arnold, 14 Id. 513; Sullivan v. Blackwell, 28 Miss. 737. The rule applies with especial force to settlements by the guardian with his ward. The guardian must prove not only an absence of undue influence, and perfect fairness and good faith, but that the ward had full opportunity to examine the accounts, either by himself, if he was able to understand them, or by the aid of some competent adviser or attorney. Fish v. Miller, 1 Hoff. Ch. 267; *In re* Van Horne, 7 Paige, 46; Stanley's Appeal, 8 Barr, 431; Say v. Barnes, 4 Serg. & R. 112; Waller v. Armistead, 2 Leigh, 11; Garvin v. Williams, 44 Mo. 465.

[2] Hylton v. Hylton, 2 Ves. Sen. 548; Hatch v. Hatch, 9 Ves. 292, 297; Kirby v. Taylor, 6 Johns. Ch. 242, 248; Kirby v. Turner, 1 Hopk. 309; Hawkins's Appeal, 32 Pa. St. 263, 265; Cowan's Appeal, 74 Id. 329; Myer v. Rives, 11 Ala. 760; Meek v. Perry, 36 Miss. 190; Sherry v. Sansberry, 3 Ind. 320.

[3] For example: Wherever a young person has actually been brought up in the family and under the care of a relative or friend. Revett v. Harvey, 1 S. & S. 502; Allfrey v. Allfrey, 1 Macn. & G. 87, 98; Espey v. Lake, 10 Hare, 260, 262; Beasley v. Magrath,

§ 962. **Parent and Child.**—"Transactions between parent and child may proceed upon arrangements between them for the settlement of property or of their rights in property in which they are interested. In such cases, courts of equity regard the transactions with favor. They do not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction.[1] On the other hand, the transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases the court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence."[2] "The law on this subject is well settled. A child makes a gift to a parent, and such a gift is good if it is not tainted by parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate, unbiased intention on the part of the child to give to the parent."[3] Where the positions of the two parties are reversed,

2 Sch. & Lef. 31; Mulhallen v. Marum, 3 Dr. & War. 317; Wiltman's Appeal, 28 Pa. St. 376; Hanna v. Spotts, 5 B. Mon. 362.

[1] Baker v. Bradley, 7 De G. M. & G. 597, 620, *per* Turner, L. J.; Tweddell v. Tweddell, T. & R. 1; Bellamy v. Sabine, 2 Phil. 425; Jenner v. Jenner, 2 De G. F. & J. 359; Williams v. Williams, L. R., 2 Ch. 294; Potts v. Surr, 34 Beav. 543; Hoghton v. Hoghton, 15 Id. 278, 305; Dimsdale v. Dimsdale, 3 Drew. 556; Cooke v. Burtchaell, 2 Dr. & War. 165; Wallace v. Wallace, 2 Id. 452.

[2] Baker v. Bradley, *supra.*

[3] Wright v. Vanderplank, 8 De G. M. & G. 133, 146, *per* Turner, L. J. In the same case the grounds of the doctrine were stated in a very forcible manner by Knight Bruce, L. J. A daughter soon after coming of age made a conveyance by way of gift to her father; the daughter marrying and afterwards dying, her husband brought this suit to set aside the conveyance. The lord justice proceeds to inquire on what grounds the deed can be impeached. After saying that the grounds were not because the amount was immoderate; nor because she was induced by any fraud, or deceit, or coercion; nor because she acted under any mistake or misapprehension; nor because she did not intend to do what she did; nor on the ground that the defendant acted dishonestly (p. 137); "but upon the ground of the close attention, the strictness, and the jealousy with which, upon principles of natural justice, and upon considerations important to the interests of society, the law of this country examines, scrutinizes, and, if I may borrow an old expression, weighs in golden scales every transaction between a guardian and his ward, or between a parent and his child, which, including or consisting of a gift from the younger to the elder, takes place so soon after the termination of the legal authority, as that the ward or child may, in consequence, probably be not, in the largest and amplest sense of the term—

where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conferring benefits upon the child may be set aside. Cases of this kind plainly turn upon the exercise of actual undue influence, and not upon any presumption of invalidity; a gift from parent to child is certainly not presumed to be invalid.[1]

not in mind as well as person—an entirely free agent."

It has sometimes been said that a different rule prevails in the United States; it has been asserted that Jenkins v. Pye, 12 Pet. 241, 253, 254, and Taylor v. Taylor, 8 How. (U. S.) 183, 201, establish another doctrine. It must be admitted that the opinions in these two cases *do* maintain that a gift from a child to his father made under the circumstances above described, is not *prima facie* voidable; that no presumption arises against its validity, but, on the contrary, the presumption is that the transaction was entered into for the purpose of promoting the interests of the child; but nevertheless all such dealings should be carefully scrutinized by the courts. In regard to this theory, I would remark: (1) That most of these expressions of opinion were entirely *obiter;* (2) they are in direct conflict with the overwhelming weight of authority; (3) they are in equally direct conflict with principle. The theory makes the gift of a child to his parent to be impeachable only on the ground of *actual* undue influence exerted by the parent, and throws upon the party contesting the validity the burden of proving the undue influence. This position is simply a denial that the relation of parent and child is in fact a fiduciary one—that it is a relation of dependence on the one side and authority on the other; since if the relation *is* in fact fiduciary, which is universally admitted, then on the plainest principle the presumption of invalidity *must* arise; and if it be not fiduciary, then there is certainly no reason whatever why dealings between the parties should be carefully scrutinized; (4) the theory and the reasoning by which it is supported, are in conflict with the common experience of mankind. To say that when a gift of property is made by a daughter to her father, just after she comes of age—perhaps for the purpose of paying his debts—it must be presumed to have been made for the purpose of promoting *her* interests—to be the result of parental affection anxious for the welfare of a child—is so opposed to universal experience and to common probability, that it is entitled to no weight whatever as a legal argument. Finally, the peculiar views of these two cases have not been generally adopted by the American courts. Most of the recent American cases hereafter cited in this note have plainly followed the equitable doctrine as first settled in England. The following cases are illustrations of the doctrine: Baker v. Bradley, 7 De G. M. & G. 597, 620; Wright v. Vanderplank, 8 De G. M. & G. 133; 2 K. & J. 1 (remedy barred by delay); Turner v. Collins, L. R., 7 Ch. 329; Kempson v. Ashbee, Id., 10 Id. 15; Savery v. King, 5 H. L. Cas. 627, 655; Davies v. Davies, 4 Giff. 417; Hannah v. Hodgson, 30 Beav. 19; Casborne v. Barsham, 2 Id. 76; Hoghton v. Hoghton, 15 Id. 278; Hartopp v. Hartopp, 21 Id. 259; Bury v. Oppenheim, 26 Id. 594; Berdoe v. Dawson, 34 Id. 603; Chambers v. Crabbe, 34 Id. 457; Potts v. Surr, Id. 543; Heron v. Heron, 2 Atk. 161; Young v. Peachy, Id. 254; Carpenter v. Heriot, 1 Eden, 338; Farrant v. Blanchford, 1 De G. J. & S. 107 (a request by a sick father near his death that a son many years past his majority would execute a release of certain claims in the son's favor against the father and another person, held not to be undue influence which would avoid the release); Miller v. Simonds, 5 Mo. App. 33 (by a daughter to her father); Davis v. Dunne, 46 Iowa, 684 (step-daughter to stepmother and her son); Bailey v. Woodbury, 50 Vt. 166 (daughter to father); Ross v. Ross, 6 Hun, 80 (child to parent); Bergen v. Udall, 31 Barb. 9; Slocum v. Marshall, 2 Wash. C. C. 397; Jenkins v. Pye, 12 Pet. 241, 253; Taylor v. Taylor, 8 How. (U. S.) 183, 201.

[1] Dalton v. Dalton, 14 Nev. 419; Mulock v. Mulock, 31 N. J. Eq. 594; Martin v. Martin, 1 Heisk. 644;

§ 963. **Other Relations.**—The equitable doctrine applies with strictness to executors and administrators, who, in common with all trustees, are prohibited from purchasing the property of the estate when sold in course of administration, and from making any personal profits by their dealings with it.[1] The same general principle extends, with more or less force, to dealings between a physician and patient,[2] a spiritual adviser and penitent,[3] vendor and vendee, of land,[4] husbands and wives, and persons occupying their position,[5] partners,[6] and indeed all persons who occupy a position of trust and confidence, of influence and dependence, in fact, although not perhaps in law.[7] There remain to be mentioned two other important relations which are partially fiduciary, and to which the principle applies with limitations—that of surety, and creditor and principal debtor,[8] and that subsisting between promoters and directors, or trustees of corporations, and the corporation itself, and the

Highberger v. Stiffler, 21 Md. 338; Todd v. Grove, 33 Id. 188; Comstock v. Comstock, 57 Barb. 453; Whelan v. Whelan, 3 Cow. 537; Deem v. Phillips, 5 W. Va. 188; Liddel's Ex'r v. Starr, 20 N. J. Eq. 274. The general doctine of the text is applied to transactions between other near relations, as gifts from a sister to brother. Thornton v. Ogden, 32 N. J. Eq. 723; Hewitt v. Crane, 2 Halst. Ch. 159, 631; Sears v. Shafter, 6 N. Y. 268; Boney v. Hollingsworth, 23 Ala. 690. It has been held, however, that there is no fiduciary relation *ipso facto* between a son-in-law and mother-in-law: Fish v. Cleland, 33 Ill. 238; Cleland v. Fish, 43 Id. 282.

[1] Scott v. Umbarger, 41 Cal. 410; Green v. Sargeant, 23 Vt. 466; Ives v. Ashley, 97 Mass. 198; Hawley v. Mancius, 7 Johns. Ch. 174; Wortman v. Skinner, 1 Beas. 358; Obert v. Obert, 2 Stock. Ch. 98; Kruse v. Steffens, 47 Ill. 112; Audenreid's Appeal, 89 Pa. St. 114.

[2] Billage v. Southee, 9 Hare, 594; Dent v. Bennett, 4 My. & Cr. 269; Aherne v. Hogan, 1 Drury, 310; Crispell v. Dubois, 4 Barb. 393; Ingersoll v. Roe, 65 Id. 346; Cadwallader v. West, 48 Mo. 483. Cases presenting the same question arising on the probate of wills are not uncommon.

[3] The religious belief or connection is immaterial: Lyon v. Home, L. R., 6 Eq. 655; Nottidge v. Prince, 2 Giff. 246; Leighton v. Orr, 44 Iowa, 679; Greenfield's Estate, 24 Pa. St. 332; Nachtrieb v. Harmony Settlement, 3 Wall. Jr. 66.

[4] Baker v. Monk, 4 De G. J. & S. 388; Clark v. Malpas, 4 De G. F. & J. 401.

[5] Corley v. Lord Stafford, 1 De G. & J. 238; Nelson v. Stocker, 4 De G. & J. 458; Turner v. Turner, 44 Mo. 535; Coulson v. Allison, 2 De G. F. & J. 521 (husband and wife's sister); Bivins v. Jarnigan, 3 Baxt. 282 (conveyance by a man to his mistress).

[6] Bayne v. Ferguson, 5 Dow. 151; Rawlins v. Wickham, 3 De G. & J. 304; M'Lure v. Ripley, 2 Macn. & G. 274; Clegg v. Edmondson, 8 De G. M. & G. 787, 807; Clements v. Hall, 2 De G. & J. 173; Perens v. Johnson, 3 Sm. & Giff. 419; Blisset v. Daniel, 10 Hare, 493, 538; Chambers v. Howell, 11 Beav. 6; Bentley v. Craven, 18 Id. 75; Maddeford v. Austwick, 2 My. & K. 279; 1 Sim. 89; Burton v. Wookey, 6 Madd. 367; Short v. Stevenson, 63 Pa. St. 95; Simons v. Vulcan Oil Co., 61 Pa. St. 202; Flagg v. Mann, 2 Sumn. 487; Wheeler v. Sage, 1 Wall. 518.

[7] A person consulting an elder and distant relative, or a confidential friend. Tate v. Williamson, L. R., 2 Ch. 55; 1 Eq. 528; Taylor v. Obee, 3 Price 83; attorney of mortgagee and mortgagor; James v. Rumsey, L. R., 11 Ch. D. 398; and see Giddings v. Giddings, 3 Russ. 241; Tanner v. Elworthy, 4 Beav. 487; Waters v. Bailey, 2 Y. & C. Ch. 219; Wakeman v. Dodd, 27 N. J. Eq. 564.

[8] See *ante*, § 907.

stockholders.[1] These subjects are more fully examined in a subsequent chapter.

§ 964. **Confirmation or Ratification.**—Where a party originally had a right of defense or of action, to defeat or set aside a transaction on the ground of actual or constructive fraud, he *may* lose such remedial right by a subsequent confirmation, by acquiescence, and even by mere delay or laches. Wherever a confirmation would itself be subject to the same objections and disabilities as the original act, a transaction can not be confirmed and made binding; for confirmation assumes some positive, distinct action or language, which, taken together with the original transaction, amounts to a valid and binding agreement. In general, contracts which are void from illegality can not be ratified and confirmed; contracts which are merely voidable because contrary to good conscience or equity, may be ratified and thus established.[2] If the party originally possessing the remedial right, has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own rights to impeach it, or ought, and might, with reasonable diligence, have become so aware, and all undue influence is wholly removed so that he can give a pefectly free consent, and he acts deliberately and with the intention of ratifying the voidable transaction, then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed.[3] If, on the other hand, the original undue influence still remains, or if the act is simply a continuation of the former transaction, or if the party wrongly supposes that the original contract or transaction is binding, or if he has not full knowledge of all the material facts and of his own rights, no act of confirmation, however

[1] See *ante* § 881. Directors and managers of corporations are in many respects trustees, and are governed by the rules applicable to trustees generally. They are prohibited from making contracts with themselves individually, from purchasing property from themselves, or selling to themselves, from making a personal profit out of their dealings with the corporation affairs, and the like. Macon v. Huff, 60 Ga. 221; Barnes v. Brown, 80 N. Y. 527.

[2] Thus contracts illegal because opposed to statute, or to public policy, or to good morals, can not be ratified, because the ratification itself would be equally opposed to statute, good morals, or public policy. Contracts obtained by actual fraud, by undue influence, by breach of fiduciary duty, and the like, may be confirmed, because *the parties alone are concerned;* the state or society has no special interest, as it has in those opposed to statute, public policy, or good morals.

[3] Chesterfield v. Janssen, 2 Ves. Sen. 125; 1 Atk. 314; Cole v. Gibson, 1 Ves. Sen. 503, 506; Crowe v. Ballard, 3 Bro. Ch. 117, 119; Cole v. Gibbons, 3 P. Wms. 290, 293; Cann v. Cann, 1 Id. 723; Dobson v. Racey, 8 N. Y. 216; Pearsoll v. Chapin, 44 Pa. St. 9; Cumberland Coal Co. v. Sherman, 20 Md. 117; and see cases in next following note.

formal, is effectual, the voidable nature of the transaction is unaltered.[1]

§ 965. **Acquiescence and Lapse of Time.**—A second mode by which the remedial right may be destroyed, and the transaction rendered unimpeachable, is acquiescence. The term acquiescence is sometimes used improperly. It differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. The theory of the doctrine is, that a party having thus recognized a contract as existing, and having done something to carry it into effect and to obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, can not afterwards be suffered to repudiate the transaction and allege its voidable nature. It follows that *mere* delay, mere suffering time to elapse without doing anything, is not acquiescence, although it may be, and often is, strong evidence of an acquiescence; and it may be, and often is, a distinct ground for refusing equitable relief either affirmative or defensive.[2] As

[1] Chesterfield v. Janssen, 2 Ves. Sen. 125; Crowe v. Ballard, 3 Bro. Ch. 117, 119; 2 Cox, 253; Cann v. Cann, 1 P. Wms. 723, 727; Wood v. Downes, 18 Ves. 120, 123, 128; Morse v. Royal, 12 Id. 355, 373; Purcell v. McNamara, 14 Id. 91; Gowland v. De Faria, 17 Id. 20; Say v. Barwick, 1 V. & B. 195; Walker v. Symonds, 3 Sw. 1; Savery v. King, 5 H. L. Cas. 627; Smith v. Kay, 7 Id. 750; Wall v. Cockerell, 10 Id. 229; De Montmorency v. Devereux, 7 Cl. & Fin. 188; Athenæum Life Soc. v. Pooley, 3 De G. & J. 294, 299; Stump v. Gaby, 2 De G. M. & G. 623; Salmon v. Cutts, 4 De G. & Sm. 125, 132; Roberts v. Tunstall, 4 Hare, 257; Wedderburn v. Wedderburn, 2 Keen, 722; Potts v. Surr, 34 Beav. 543; Waters v. Thorn, 22 Id. 547; Cockell v. Taylor, 15 Id. 103, 125; Cockerell v. Cholmeley, 1 Russ. & My. 418, 425; Murray v. Palmer, 2 Sch. & Lef. 474, 486; Roche v. O'Brien, 1 Ball. & B. 330, 338, 340, 353; Dunbar v. Tredennick, 2 Id. 304, 316, 317; Mulhallen v. Marum, 3 Dr. & War. 317; Dobson v. Racey, 8 N. Y. 216; Comstock v. Ames, 3 Keyes, 357; Cumberland Coal Co. v. Sherman, 30 Barb. 553; S. C., 20 Md. 117; Hoffman etc. Co. v. Cumberland C. Co., 16 Id. 456; Boyd v. Hawkins, 2 Dev. Eq. 195; Butler v. Haskell, 4 Desau. Eq. 651; McCormick v. Malin, 5 Blackf. 509; Williams v. Reed, 3 Mason, 405. The same rules apply to a release. Lloyd v. Attwood, 3 De G. & J. 614; Farrant v. Blanchford, 1 De G. J. & S. 107, 119; Aveline v. Melhuish, 2 Id. 288; Eyre v. Burmester, 10 H. L. Cas. 90, 106; Duke of Leeds v. Amherst, 2 Phil. 117; Wedderburn v. Wedderburn, 4 My. & Cr. 41; 2 Keen, 722, 728; Parker v. Bloxam, 20 Beav. 295; Millar v. Craig, 6 Id. 433; Bowles v. Stewart, 1 Sch. & Lef. 209; Skilbeck v. Hilton, L. R., 2 Eq. 587; Heron v. Heron, 2 Atk. 161; Steadman v. Palling, 3 Atk. 423; Pusey v. Desbouvrie, 3 P. Wms. 315; Broderick v. Broderick, 1 Id. 239; Salkeld v. Vernon, 1 Eden, 64; Bradley v. Chase, 22 Me. 511; Parsons v. Hughes, 9 Paige, 591; Michoud v. Girod, 4 How. (U. S.) 503.

[2] See Duke of Leeds v. Amherst, 2 Phil. 117, 123. The true nature and effect of acquiescence were admirably

acquiescence is thus a recognition of and consent to the contract or other transaction as existing, the requisites to its being effective as a bar are, knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action; a conscious intention to ratify the transaction, however, is not an essential element. When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes

stated by Thesiger, L. J., in delivering the opinion of the court of appeal in the very recent case of De Bussche v. Alt, L. R., 8 Ch. D. 286, 314. The suit was brought to set aside a sale made by an agent to himself in violation of his fiduciary duty. The Lord Justice said: "It still remains to be considered whether, short of such ratification or adoption, the plaintiff can be held to have by his conduct in any way precluded himself from taking the present proceedings. The term *acquiescence* which has been applied to his conduct, is one which was said by Lord Cottenham in Duke of Leeds v. Amherst (*supra*), ought not to be used; in other words, it does not accurately express any known legal defense, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he can not afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term acquiescence, and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, can not be divested without accord and satisfaction, or release under seal. *Mere submission* to the injury for any time short of the period limited by statute for the enforcement of the right of action, can not take away such right, although under the name of *laches* it may afford a ground for refusing relief under some peculiar circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding." In pursuance of this principle so admirably explained, the doctrine of "acquiescence" properly belongs to and is hereinbefore discussed in connection with equitable estoppel, *ante*, §§ 816–821. See also 2 Eq. Lead. Cas. 1263 (4th Am. ed.); Kerr on Fraud, 298–303.

unimpeachable in equity.[1] Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; *laches* are often a defense wholly independent of the statute of limitations. Promptness in asserting a remedial right against fraud is sometimes required; but no delay will prejudice a defrauded party as long as he was igno-

[1] Kerr on Fraud, 301, 302; Randall v. Errington, 10 Ves. 423, 426, 428; Cholmondeley v. Clinton, 2 Meriv. 171, 361; Honner v. Morton, 3 Russ, 65; Selsey v. Rhoades, 1 Bligh, N. S., 1; Vigers v. Pike, 8 Cl. & Fin. 562, 650; Charter v. Trevelyan, 11 Id. 714; Bernal v. Lord Donegal, 3 Dow, 133; Bayne v. Ferguson, 5 Id. 151; Archbold v. Scully, 9 H. L. Cas. 360; Bullock v. Downes, 9 Id. 1; Wall v. Cockerell, 10 Id. 229; Loader v. Clarke, 2 Macn. & G. 387; Wright v. Vanderplank, 8 De G. M. & G. 133; Stone v. Godfrey, 5 Id. 76; Wall v. Cockerell, 3 De G. F. & J. 737, 742; Skottowe v. Williams, 3 Id. 535; Graham v. Birkenhead etc. Ry., 2 Macn. & G. 146; Coles v. Sims, 5 De G. M. & G. 1; Life Ass'n of Scotland v. Siddal, 3 De G. F. & J. 58, 74; Great West. Ry. v. Oxford etc. Ry., 3 De G. M. & G. 341; Ormes v. Beadel, 2 De G. F. & J. 333; Edwards v. Meyrick, 2 Hare, 60, 75; Tanner v. Smith, 10 Sim. 410; Dimsdale v. Dimsdale, 3 Drew. 556; Bellew v. Russell, 1 Ball & B. 96; Blennerhassett v. Day, 2 Id. 104; Nagle v. Baylor, 3 Dr. & War. 60; Odlin v. Gove, 41 N. H. 465; Bassett v. Salisbury etc. Co., 47 N. H. 426, 439; Peabody v. Flint, 6 Allen, 52; Fuller v. Melrose, 1 Id. 166; Tash v. Adams, 10 Cush. 252; Briggs v. Smith, 5 R. I. 213; Schiffer v. Dietz, 83 N. Y. 300, 307, 308; Cobb v. Hatfield, 46 Id. 533; Tompkins v. Hyatt, 28 Id. 347; Lawrence v. Dale, 3 Johns. Ch. 23; More v. Smedburgh, 8 Paige, 600; Masson v. Bovet, 1 Denio, 69; Gale v. Nixon, 6 Cow. 444; Crosier v. Acer, 7 Paige, 137; Moffat v. Winslow, 7 Id. 124; Saratoga etc. R. R. Co. v. Rowe, 24 Wend. 74; Bruce v. Davenport, 3 Keyes, 472; Doughty v. Doughty, 3 Halst. Ch. 227; Gray v. Ohio etc. R. R., 1 Grant Cas. 412; Little v. Price, 1 Md. Ch. 182; Moore v. Reed, 2 Ired. Eq. 580; Burden v. Stein, 27 Ala. 104; Pillow v. Thompson, 20 Tex. 206; Edwards v. Roberts, 7 Sm. & Mar. 544; Ayres v. Mitchell, 3 Id. 683; McNaughton v. Partridge, 11 Ohio, 232; Borland v. Thornton, 12 Cal. 440; Phelps v. Peabody, 7 Id. 50; Marsh v. Whitmore, 21 Wall, 178. The following cases are remarkable instances of relief given after a considerable lapse of time: Gresley v. Mousley, 4 De G. & J. 78; Baker v. Bradley, 7 De G. M. & G. 597; Michoud v. Girod, 4 How. (U. S.) 503, 561.

The doctrine concerning acquiescence from conduct and from lapse of time is applied with special strictness in mercantile contracts, such as dealings with stock, and subscriptions for shares, and in agreements of a speculative nature. See *ante*, § 881; Ashley's Case, L. R., 9 Eq. 263; *In re* Estates Investment Co., Id. 10 Eq. 503; Smallcombe's Case, Id. 3 Eq. 769; Kent v. Freehold etc. Co., Id. 3 Ch. 493; Sharpley v. Louth etc. Ry., Id., 2 Ch. D. 663; Ayerst v. Jenkins, Id., 16 Eq. 275; Heymann v. European etc. Ry., Id., 7 Id. 154; Dentou v. MacNeil, Id. 2 Id. 352; Taite's Case, Id., 3 Id. 795; Jennings v. Broughton, 5 De G. M. & G. 126, 140; Clegg v. Edmondson, 8 Id. 787; Clements v. Hall, 2 De G. & J. 173; Whalley v. Whalley, 2 De G. F. & J. 310; Prendergast v. Turton, 1 Y. & C. Ch. 98; Lovell v. Hicks, 2 Y. & C. Ex. 46; Attwood v. Small, 6 Cl. & Fin. 232, 359; Ashurst's Appeal, 60 Pa. St. 290; Watts' Appeal, 78 Id. 371; Evans' Appeal, 81 Id. 278.

It follows from the doctrine as to acquiescence that a vendee of real estate must surrender up possession acquired under the contract before he can maintain an action for its cancellation. See More v. Smedburgh, 8 Paige, 600; Gale v. Nixon, 6 Cow. 444; Tompkins v. Hyatt, 28 N. Y. 347.

rant of the fraud. Each case involving the defense of delay or lapse of time must to a great extent depend upon its own circumstances.[1]

§ 966. **Third. Frauds against Third Persons who are not Parties to the Transaction.**—As a general rule, in the cases which come within this group, and strictly speaking none others should belong to it, the transaction is not fraudulent as to the immediate parties—the grantor and the grantee, and the like; at least neither of them is permitted, as against the other, to set aside the conveyance, or to defeat the enforcement of the contract if it be executory. The transaction is of such a nature that it defrauds, or invades the rights of third persons, who are not its immediate parties; and they alone are, in general, entitled to impeach it and to obtain affirmative relief against it.[2] The only cases to be considered under this division are secret bargains in fraud of compositions with creditors, transfers in fraud of creditors, and transfers in fraud of subsequent purchasers.[3]

§ 967. **Secret Bargains in Fraud of Compositions with Creditors.**—Where a composition is made by a debtor with his creditors upon the basis of his payment to all who join in the transaction the same proportionate share of their claims, and of being therefore discharged by them from all further liability, a secret agreement by the debtor with one of these creditors, expressly or impliedly, as a condition for the latter's joining in the composition, whereby the debtor pays or secures to the favored creditor a further sum of money or amount of property, or greater advantage than that received and shared alike by all the other creditors, is a fraud upon such other creditors, and is voidable. The agreement, if executory, can not be enforced against the debtor in equity or at law; the security may be set aside by a court of equity, and the amount paid by the debtor in pursuance of the contract may be recovered back by him. The relief, defensive or affirmative, thus given to the debtor, does not rest upon any consideration of favor due and shown to him, but wholly upon motives of policy,

[1] See *ante*, § 917; vol. 1, §§ 418, 419; Kerr on Fraud, 303–312; Diman v. Providence etc. R. R., 5 R. I. 130; Lloyd v. Brewster, 4 Paige, 537; Thomas v. Bartow, 48 N. Y. 193, 200; Saratoga etc. R. R. v. Rowe, 24 Wend. 74; Brown v. Co. of Buena Vista, 5 Otto, 157, 160; Sullivan v. Portland etc. R. R., 4 Id. 806; Grymes v. Sanders, 3 Id. 55, 62.

[2] This is the general rule; there is, however, one important exception mentioned in the next paragraph.

[3] Other particular instances, including sales by expectants, *post obit* contracts, etc., which are placed in the group by some writers, have already been examined in previous paragraphs. In most of them, whatever be the grounds of the invalidity, the transaction may be impeached by one of its immediate parties.

to protect the rights of the other creditors and to secure them against such frauds.[1] It would seem, on principle, that a secret bargain by the debtor, giving or securing an advantage to one creditor, should also avoid the composition agreement, at the option of the other creditors who are parties to it, and enable them to recover the full amount of their demands against the debtor, notwithstanding the discharge contained in the composition. In no other manner can the defrauded creditors obtain relief from an agreement, confessedly obtained by a fraud upon their rights. This result is sustained by at least a portion of the decisions.

§ 968. **Conveyances in Fraud of Creditors.**—Dealings by a person with his property with intent to defraud his creditors were voidable at the common law;[2] but the existing rules on the subject both in England and in this country are founded upon statute.[3] The operative statute in England, which is also the

[1] Cullingworth v. Lloyd, 2 Beav. 385; Wood v. Barker, L. R., 1 Eq. 139; *In re* Lenzberg, Id., 7 Ch. D. 650; Mare v. Sandford, 1 Giff. 288; Mare v. Walker, 3 Id. 100; Pendlebury v. Walker, 4 Y. & C. 424, 434; Jackman v. Mitchell, 13 Ves. 581; *Ex parte* Sadler, 15 Id. 52; Mackenzie v. Mackenzie, 16 Id. 372; Mawson v. Stock, 6 Id. 301; Eastabrook v. Scott, 3 Id. 456; Child v. Danbridge, 2 Vern. 71; Small v. Brackley, Id. 602; Middleton v. Lord Onslow, 1 P. Wms. 768; Spurret v. Spiller, 1 Atk. 105; Duffy v. Orr, 1 Cl. & Fin. 253; 5 Bligh N. S. 620; Lee v. Lockhart, 3 My. & Cr. 302; Harvey v. Hunt, 119 Mass. 279; Case v. Gerrish, 15 Pick. 49; Ramsdell v. Edgarton, 8 Met. 227; Lothrop v. King, 8 Cush. 382; Doughty v. Savage, 28 Conn. 146; Solinger v. Earle, 82 N. Y. 393; Van Bokkelen v. Taylor, 62 N. Y. 105; Lawrence v. Clark, 36 Id. 128; Solinger v. Earle. 45 N. Y. Supr. Ct. 80, 604; Brock v. Cole, 4 Sandf. 79; Feldman v. Gamble, 26 N. J. Eq. 494; Loucheim Brothers' Appeal, 67 Pa. St. 49; Patterson v. Boehm. 4 Barr, 507; Mann v. Darlington, 3 Harris, 310; Lanes v. Squyres, 45 Tex. 382; Clarke v. White, 12 Pet. 178. In Loney v. Bailey, 43 Md. 10, the rule is laid down as follows: In a composition agreement a debtor professes to deal with all creditors entering it on terms of perfect equality, and a secret agreement giving a creditor an undue advantage vitiates the agreement as being a fraud upon the other creditors, who may sue for and recover the full amount of their original indebtedness, less the amount they have received under the composition, and it is not essential that the composition agreement should first be rescinded, and the money recovered under it returned. This would seem to be the just and equitable effect of such a secret bargain upon the rights of the composition creditors. Argall v. Cook, 43 Conn. 160, holds that the fact of a debtor intending to pay certain of the creditors joining in a composition deed, in full out of his future earnings, does not invalidate the composition as to other creditors, if there is no *agreement* tending to defraud them; and see Elfelt v. Snow, 2 Sawy. 94. Other secret agreements made by an insolvent with his assignee, or otherwise, tending to secure benefits for himself or family by withdrawing his property from his creditors, are fraudulent as against the creditors. See McNeil v. Cahill, 2 Bligh, 228; Miller v. Sauerbier, 30 N. J. Eq. 71; *In re* Jacobs, 18 Bankr. Reg. 48; *In re* Blumenthal, 18 Id. 555.

[2] Cadogan v. Kennett, Cowp. 432; Copis v. Middleton, 2 Madd. 410, 428; Barton v. Vanheythuysen, 11 Hare, 126, 131, 132; Clark v. Douglass, 62 Pa. St. 408; Clements v. Moore, 6 Wall. 299, 312.

[3] The earlier statutes were 50 Edw. III., c. 6; 3 Hen. VII., c. 4.

basis of all legislation and judicial decision in the United States, is the celebrated act 13 Eliz., c. 5. It enacts that all conveyances, etc., of any lands, goods, or chattels, had or made of purpose to delay or defraud creditors and others of their actions or debts, shall be taken only as against such persons and their representatives as shall or might be so delayed or defrauded, to be utterly void; provided that the act shall not extend to any conveyance or assurance made on good consideration and *bona fide* to a person not having notice of such fraud.[1] I purpose merely to state, as far as possible, the general and fundamental principles and doctrines which have been established in the judicial construction of this legislation, and the most important classes of cases to which it is applied.[2]

§ 969. **The Consideration.**—It should be observed that the statute, by its generality of expression, being without any such limitation, applies to both existing and subsequent creditors, and to both conveyances made upon a valuable consideration, and those without any consideration. It does not declare voluntary conveyances void; it only pronounces *fraudulent* conveyances void, whether they are voluntary or made upon a consideration. The validity of a conveyance, as against creditors, is made in the proviso to depend "upon its being upon a good consideration and *bona fide;*" either is not sufficient; consideration without good faith plainly does not displace the operation of the statute; and good faith without consideration does not nec-

[1] All the substantial provisions of this statute have been adopted by the American legislation; still the statutes in many or most of the states employ quite different language, and contain important modifications and additions. Some of them insert a general clause, in terms applying to all the other provisions, to the effect that the fraudulent intent shall always be a question of fact; in some this clause is confined to a portion only of the provisions; while in some it is entirely omitted. There is a great diversity of external form at least in the American legislation on this subject. The exact terms of the statute 13 Eliz., describing what dealings are thus void, are as follows: "All feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions contrived of malice, fraud, covin, or collusion, to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages," etc.

[2] Since these fraudulent transfers are void at law as well as in equity, so that the jurisdiction of equity is merely supplementary to that of the law courts; and since the details of the American statutes are so varied, and since the subject in all its applications is so very extensive, it would be impossible within the limits of such a treatise as this, to enter upon any discussion of specific rules, or to do more than give the general doctrines. The practical application of these principles, the instances in which the equitable jurisdiction is exercised, and the reliefs which are given, will be described in a subsequent chapter which treats of "creditors' suits" and other remedies granted to creditors. A full discussion of the statute both in law and in equity will be found in the editorial notes to Twyne's Case, 1 Smith's Lead. Cas. 33; Sexton v. Wheaton, 1 Am. Lead. Cas. 17; and Kerr on Fraud, 196–215.

essarily protect a conveyance. A deed made upon a valuable consideration, but not *bona fide*—that is, with a fraudulent intent—is void against creditors of the grantor as though it were voluntary.[1] Although the statute speaks of a "good consideration," yet it is fully settled that a *valuable* consideration is intended—a consideration pecuniary in contemplation of law, of which kind marriage is an instance. The "good" consideration of love and affection does not meet the demands of the statute, and does not of itself validate a conveyance.[2] Voluntary conveyances are perfectly valid and binding as between the immediate parties and all persons claiming under them in privity of estate,[3] but they may be void as against creditors, and will be void so far as they delay or defraud creditors. A voluntary conveyance may be a strong indication of a fraudulent intent, and may sometimes raise a presumption of such intent; still the fact that a conveyance is voluntary, under the general course of legislation and decision in this country, is material only in connection with the fraudulent intent, only as it shows or tends to show the existence of such intent.[4] A voluntary conveyance *as such* is not necessarily void even against existing creditors.

§ 970. **The Fraudulent Intent.**—The essential element required by the statute, in order to render a transfer voidable, is the fraudulent intent. There *must* be an intent to hinder, delay, or defraud creditors. All other considerations are subordinate and ancillary to the establishment of this indispensable

[1] For example: A conveyance made by a defendant, for full value, but with intent to defraud the plaintiff by placing the property beyond the reach of an expected judgment. Blenkinsopp v. Blenkinsopp, 1 De G. M. & G. 495; Twyne's Case, 3 Co. Rep. 80; Cadogan v. Kennett, Cowp. 432, 434; Holmes v. Penney, 3 K. & J. 90, 99; Bott v. Smith, 21 Beav. 511, 516; Harman v. Richards, 10 Hare, 81, 89; Clements v. Moore, 6 Wall. 299; Robinson v. Holt, 39 N. H. 557; Root v. Reynolds, 32 Vt. 139; Wadsworth v. Williams, 100 Mass. 126; Gragg v. Martin, 12 Allen, 498; Haymaker's Appeal, 53 Pa. St. 306; Pulliam v. Newberry, 41 Ala. 168.

[2] Copis v. Middleton, 2 Madd. 410, 430; Taylor v. Jones, 2 Atk. 600; Goldsmith v. Russell, 5 De G. M. & G. 547, and all the cases arising out of voluntary conveyances are authorities.

[3] If they are impeachable by such successors as assignees in bankruptcy, insolvency, and others in like position, it is because such persons are representatives of creditors more than of the parties from whom they immediately derive title.

[4] This conclusion may seem to be inconsistent with the statement that the statute requires both a valuable consideration and good faith, and that good faith without such consideration is not sufficient. The conclusion, however, is certainly sustained by the course of legislation and the current of modern decision in the United States. It is firmly settled, as the general doctrine, that a voluntary conveyance, made by a party indebted, and largely indebted, is not necessarily void; its voidable nature depends upon the intent; but the circumstances may be such that the intent is inferred as an irresistible conclusion. See cases cited subsequently on voluntary conveyances.

feature. The discussion which has arisen under the statute, and the special rules which have been formulated, are chiefly concerned with the question, when, how, and by what means may this intent be ascertained?[1] There are three general modes in which the intent might possibly be ascertained; certain circumstances appearing, it might (1) be inferred therefrom as a conclusive presumption of law, or (2) as a *prima facie* or rebuttable presumption of law, or (3) as an argumentative conclusion of fact. With respect to these modes, the intent may be *express* or *actual*, which simply means that it is proved by means of ordinary evidence, either direct or circumstantial, tending to show its existence; or it may be *implied*, or inferred as a presumption from certain circumstances connected with or forming a part of the transaction.[2] In relation to the mode of ascertaining the fraudulent intent, when, how, and from what it may be inferred, there is a great diversity and even conflict of judicial opinion, and to some extent antagonistic rules are settled in different states. Any attempt to reconcile this discrepancy would be unavailing. I shall merely formulate those general doctrines which are sustained by the consent of the highest authority, as well as by principle, and which constitute a part of the equity jurisprudence; and it will be the most convenient to state them in their connection with and relations to the most important classes of cases which occur in the actual transactions of men.

§ 971. **Mode of Ascertaining the Intent.**—In the first place, where a conveyance is made upon a valuable consideration, and is alleged to be fraudulent against the grantor's

[1] At an early day the intent was inferred as a *conclusive* presumption of law from many particular circumstances—as for example, from the fact that the vendor retained possession of the property conveyed; see the discussions in Twyne's case. Later, the tendency has been to abandon the notion of conclusive presumptions, and to infer the intent as a *rebuttable* presumption of law from a variety of circumstances; and this doctrine still prevails in England and in many of the states, at least in its application to some circumstances. Finally, in consequence of a statutory provision, the view has been adopted *theoretically* in several of the states, that the intent must always be inferred as an argumentative conclusion of fact, without the aid of any legal presumptions. I describe this view as prevailing *theoretically*, because it will be found that the courts of those states, in the decision of cases, do practically have recourse to *prima facie* presumptions, in determining the existence of the fraudulent intent.

[2] Among these circumstances the most common and important are the insolvency of the grantor, or the extent of his indebtedness compared with the amount of his property, especially where the conveyance is voluntary; and the fact that the grantor or vendor retains possession of the property conveyed or sold. This last circumstance applies equally where the conveyance is voluntary or upon a valuable consideration. It seems impossible to decide all cases arising under the statute without having recourse, practically if not avowedly, to the doctrine of legal presumptions.

creditors, an actual and express intent to hinder, delay, or defraud is necessary to be proved. The reason for this is obvious. The transaction has one of the requisites prescribed by the statute; the voluntary character is wanting from which an inference of fraudulent intent *might* arise. On the contrary, the other requisite—the good faith—would rather be presumed. It is necessary, therefore, to overcome this presumption by *proving* the absence of good faith. In other words, the actual and express fraudulent intent must be proved by evidence tending to show its existence, and from which it legitimately results as a conclusion of fact drawn by a court or jury without the aid of any legal presumptions.[1] In the second place, where a conveyance is voluntary, and is alleged to be fraudulent as against *existing* creditors, while an express actual intent to defraud may be present, it is not necessary. The fraudulent intent which will avoid the conveyance as against existing creditors may be inferred from circumstances connected with the transaction, such as the grantor's insolvency, great indebtedness compared with the amount of his property, and the like; complete insolvency, however, is clearly not a *requisite*. In this case of a voluntary deed and existing creditors, the decisions show unmistakably that the intent is more easily inferred than in any other.[2] In the third place, where a conveyance is voluntary,

[1] Freeman v. Pope, L. R., 5 Ch. 538, 544 *per* Giffard, L. J.; Holmes v. Penney, 3 K. & J. 90; Lloyd v. Attwood, 3 De G. & J. 614; Bott v. Smith, 21 Beav. 511, 516; Harman v. Richards, 10 Hare, 81, 89 (the V. C. said "those who undertake to impeach for *mala fides* a deed which has been executed for a valuable consideration, have, I think, a task of great difficulty to discharge"); Clements v. Moore, 6 Wall. 299; Robinson v. Holt, 39 N. H. 557; Root v. Reynolds, 32 Vt. 139; Wadsworth v. Williams, 100 Mass. 126; Gragg v. Martin, 12 Allen, 498; Haymaker's Appeal, 53 Pa. St. 306; Pulliam v. Newberry, 41 Ala. 168.

[2] In the important case of Spirett v. Willows, 3 De G. J. & S. 293, 302, Lord Westbury said: "If the debt of the creditor by whom the voluntary conveyance is impeached, existed at the date of the conveyance, and it is shown that the remedy of the creditor *is* defeated or delayed by the existence of the conveyance, it is immaterial whether the debtor was or was not solvent after making the conveyance." This is true, but is not the whole truth. It is susceptible of the interpretation that if the debtor is not insolvent, then an express actual intent to defraud is necessary. This meaning would be contrary to the well-settled doctrine. In the subsequent case of Freeman v. Pope, L. R., 5 Ch. 538, decided by the court of appeal, Lord Hatherley commented upon this language of Lord Westbury, and said (p. 543): "It is expressed in very large terms, probably too large. It seems to me that the difficulty felt by the V. C. [in the decision appealed from] arose from his thinking that it was necessary to prove an actual intention to delay creditors, where the facts are such as to show that the necessary consequence of what was done was to delay them." Lord Hatherley goes on to show by many examples that such an intent is not necessary. In the same case L. J. Giffard said (p. 544): "The V. C. seems to have considered that, in in order to defeat a voluntary conveyance, there must be proof of an actual express intent to defeat creditors.

and is alleged to be fraudulent as against *subsequent* creditors, the intent to defeat or defraud is not so easily inferred as in the case of existing creditors; stronger evidence is then required to establish the intent. "If a voluntary conveyance or deed of gift be impeached by subsequent creditors whose debts had not been contracted at its date, then it is necessary to show either that the grantor made the conveyance with express intent to delay, hinder, or defraud creditors; or that after the conveyance the grantor had no sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency; in which case the law infers that the conveyance was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void."[1] This proposition is clearly correct, but it contains one *apparent* limitation which hardly seems to be sustained by the weight of American authority; it is not essential that the voluntary grantor should be "reduced to a state of insolvency," or, in other words, that he should be left absolutely unable to pay his then existing debts. The following seems to be the true rule: If the

That, however, is not so. There is one class of cases, no doubt, in which an actual express intent is necessary to be proved; that is, where the instruments sought to be set aside were founded on valuable consideration. But where the conveyance is voluntary, *then the intent may be inferred in a variety of ways.* For instance, if after deducting the property which is the subject of the voluntary conveyance, sufficient available assets are not left for the payment of the grantor's debts, then the law infers intent; and it would be the duty of a judge in leaving the case to the jury, to tell the jury that they must presume that such was the intent. Again, if at the date of the conveyance the person making it was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary conveyance, to defeat and delay them." On the other hand, in the important case of Skarf v. Soulby, 1 Macn. & G. 364, 374, Lord Cottenham held that, although it was not necessary to show insolvency, the mere fact that the grantor then owed some debts was not sufficient to invalidate a voluntary conveyance against existing creditors; citing Townsend v. Westacott, 2 Beav. 340, *per* Lord Langdale; and Richardson v. Smallwood, Jacob, 552, *per* Sir Thos. Plumer. This is beyond question the settled rule. For further cases see *post*, § 972, and note.

[1] Spirett v. Willows, 3 De G. J. & S. 293, 302, 303, *per* Lord Westbury. The lord chancellor adds: "It is obvious that the fact of a voluntary grantor retaining money enough to pay the debts which he owes at the time of making the conveyance, *but not actually paying them*, can not give a different character to the conveyance or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of creditors are delayed, hindered, or defrauded." This proposition is certainly opposed to the current of American authority, and it seems to be equally contrary to the English decisions. See Kent v. Riley, L. R., 14 Eq. 190, 194. If the voluntary grantor retains property sufficient to pay all his existing debts, but for any reason fails to pay them, and finally becomes insolvent, this fact might be a circumstance to be considered in determining upon the existence of a fraudulent intent, but it certainly would not of itself render the conveyance invalid. See Carr v. Breese, 81 N. Y. 584, 588, 590, 591; Dunlap v. Hawkins, 59 N. Y. 342; Jencks v. Alexander, 11 Paige, 619, 623; and see *post*, § 973, and notes.

amount of property after the voluntary conveyance was so small in comparison with the existing indebtedness that the grantor could not reasonably have contemplated his ability to perform his obligations, or, in other words, he could reasonably have contemplated his inability to perform them, then an intent to defeat his creditors generally will be inferred, and the conveyance will be fraudulent against subsequent as well as against existing creditors.[1] Having thus ascertained the general rules concerning the manner of establishing or inferring the fraudulent intent, I shall apply these rules very briefly to the two classes of creditors, existing and subsequent.

§ 972. **Existing Creditors.**—Conveyances made upon a valuable consideration are not presumed to be fraudulent against existing creditors, and the extent of the grantor's indebtedness is wholly immaterial.[2] Conveyances upon a valuable and even full consideration are void against existing and subsequent creditors, if made with an actual express intent to hinder, delay, or defraud them; but the intent can not be inferred by presumptions, and must be proved by evidence legitimately tending to show its existence. Each case must necessarily depend upon its own circumstances.[3] A voluntary conveyance, gift,

[1] In Carr v. Breese, 81 N. Y. 584, 588, 590, Mr. Justice Miller said: "A review of the cases shows that none of them have any application to the present, where there is no evidence to show a fraudulent purpose, and a considerable amount of property, amply sufficient to meet present debts and future liabilities in the prosecution of the business in which the grantor was engaged, was retained for that purpose. An existing indebtedness alone does not render a voluntary conveyance absolutely fraudulent and void as against creditors, unless there is an express intent to defraud (Van Wyck v. Seward, 6 Paige, 62). This is especially the case where it is shown that the residue of the property was amply sufficient to pay all debts (Jackson v. Post, 15 Wend. 588; Phillips v. Wooster, 36 N. Y. 412; Bank of U. S. v. Housman, 6 Paige, 526; Dunlap v. Hawkins, 59 N. Y. 342). In the case last cited the conveyance for the benefit of the wife was upheld, and Allen, J., who delivered the opinion of the court, says: "By proving the pecuniary circumstances of the grantor, his business, and its risks and contingencies, his liabilities and obligations, absolute and contingent, and his resources and means of meeting and solving his obligations, and showing that he was neither insolvent nor contemplated insolvency, *and that an inability to meet his obligations was not and could not reasonably be supposed to have been in the mind of the party*, is the only way in which the presumption of fraud, arising from the fact that the conveyance is without a valuable consideration, can be repelled and overcome." Carpenter v. Roe, 10 N. Y. 227; Savage v. Murphy, 34 N. Y. 508; and see *post*, § 973.

[2] If the conveyance were upon a full as well as valuable consideration, no presumption could arise even though the grantor were wholly insolvent, since it would be merely changing the form of his assets. An ante-nuptial settlement on his wife by an insolvent trader, not unreasonable in amount, is valid. *Ex parte* McBurnie, 1 De G. M. & G. 441; Kevan v. Crawford, L. R., 6 Ch. D. 29.

[3] Blumer v. Hunter, L. R., 8 Eq. 46 (*ante*-nuptial settlement on wife void, because made with actual intent to defraud creditors, the wife being a participant), and see cases cited *ante* under § 969.

or transfer without any valuable consideration, creates a *prima facie* presumption of an intent to defraud existing creditors, unless statutes have declared that no such presumption ever arises, and that the intent is always a conclusion of fact. This presumption may be overcome. The mere fact that a grantor is indebted at the time he makes a voluntary conveyance, does not necessarily render such conveyance fraudulent against the existing creditors.[1] On the other hand, since the *prima facie* presumption arises in such case, it is never necessary to show by affirmative evidence an actual express intent to defraud, in order to render a voluntary conveyance fraudulent and void as against existing creditors. The intent will be inferred when the grantor was or is left insolvent, or if the conveyance deprives him of the means of paying his debts, or if he was so largely indebted that it would be reasonable to suppose that he contemplated his inability to pay his debts, or, as many cases hold, if he was so largely indebted that the conveyance would materially interfere with his ability to meet his obligations.[2]

[1] The contrary doctrine was laid down by Chan. Kent in the celebrated case of Reade v. Livingston, 3 Johns. Ch. 481. The modern English decisions have shown that the early authorities upon which Chan. Kent relied—among others, Lord Hardwicke's opinion in Lord Townshend v. Windham, 2 Ves. Sen. 1; Russell v. Hammond, 1 Atk. 13; and Walker v. Burrows, Id. 93—do not admit of the interpretation which he put upon them. The rule given in the text is now well established in England, and generally in this country. Reade v. Livingston has been repeatedly overruled. Skarf v. Soulby, 1 Macn. & G. 364; Townsend v. Westacott, 2 Beav. 340; Kent v. Riley, L. R., 14 Eq. 190; Freeman v. Pope, Id., 5 Ch. 538; Van Wyck v. Seward, 6 Paige, 62; Bank of U. S. v. Housman, Id. 526; Jackson v. Post, 15 Wend. 588; Phillips v. Wooster, 36 N. Y. 412; Dunlap v. Hawkins, 59 Id. 342.

The prevailing doctrine in this country is, that indebtedness, at the time of a voluntary conveyance, creates only a *prima facie* presumption of fraud; and that each case must largely depend upon its own circumstances, the amount of the indebtedness, the condition of the grantor's business affairs, etc. Sexton v. Wheaton, 8 Wheat. 229, 230; Hinde v. Longworth, 11 Id. 199; Brackett v. Waite, 4 Vt. 389; Lerow v. Wilmarth, 9 Allen, 382, 386; Thacher v. Phinney, 7 Id. 146; Beal v. Warren, 2 Gray, 447; Norton v. Norton, 5 Cush. 524; Salmon v. Bennett, 1 Conn. 525, 528 551; Bank of U. S. v. Housman, 6 Paige, 526; Seward v. Jackson, 8 Cow. 406, 423, 434, 438; Verplank v. Sterry, 12 Johns. 536, 559; Posten v. Posten, 4 Whart. 26; Chambers v. Spencer, 5 Watts, 404.

[2] These instances of course include the conditions, spoken of in some decisions, of the voluntary conveyance covering all the debtor's property, or covering so large a part of it that sufficient is not left to meet his existing indebtedness. In Smith v. Cherrill, L. R., 4 Eq. 390, 395, V. C. Malins said: "The doctrine of the court well established is this: if a person makes a voluntary settlement, and is, at the time, indebted to the extent of insolvency, or if the effect of the settlement is to deprive him of the means of paying, the settlement is void as against creditors." This is clearly correct. In Parkman v. Welch, 19 Pick. 231, 235, Dewey, J., said: "All that is necessary to entitle a creditor to impeach a deed as fraudulent, when made without a valuable consideration, *is that the grantor be deeply indebted.*" This rule appears to be very simple; the practical difficulty in applying it would consist in determining when a person is "deeply indebted." Deep indebtedness is

§ 973. **Subsequent Creditors.**—Where a person whether indebted or not makes a conveyance either upon a valuable consideration or voluntary, with the express and actual intent of defrauding future creditors, it is of course fraudulent and void as against such future creditors. For this reason if a person in contemplation of a future indebtedness which he expects to accrue, makes a conveyance for the purpose of placing his property beyond the liability for such anticipated indebtedness, the transfer is fraudulent as against the future creditor when his claim arises.[1] A voluntary conveyance by one who is at the time free from debt, is not presumptively fraudulent and void as against subsequent creditors; there being no *prima facie* presumption against its validity, the burden of proof rests upon the subsequent creditor who impeaches it, of showing either an actual fraudulent intent, or circumstances from which such intent may be inferred.[2] If a person, not at the time indebted, being about to engage in a new and hazardous business, makes a voluntary settlement or conveyance, whereby he places his property or a considerable portion of it beyond the reach of his creditors, such settlement or conveyance is fraudulent and void as against the subsequent creditors of the grantor.[3] Finally, it

merely a relative, not an absolute term. The amount of the indebtedness must always be compared with the debtor's reasonable ability to pay based upon the amount of his available property. Here we are thrown back upon the circumstances of each case; and no more definite rule for inferring the fraudulent intent in general can be given than that laid down above in the text. The following cases are simply cited as illustrations of the doctrine: Spirett v. Willows, 3 De G. J. & S. 293; French v. French, 6 De G. M. & G. 95; Goldsmith v. Russell, 5 Id. 547; Reese River etc. Co. v. Atwell, L. R., 7 Eq. 347; Cornish v. Clark, Id., 14 Id. 184; Freeman v. Pope, Id., 5 Ch. 538; Taylor v. Coenen, Id., 1 Ch. D. 636; Jenkyn v. Vaughan, 3 Drew. 419; Barlou v. Vanheythuysen, 11 Hare, 126; Thompson v. Webster, 4 Drew. 628; Church v. Chapin, 35 Vt. 223; Pomeroy v. Bailey, 43 N. H. 118; Coolidge v. Melvin, 42 Id. 510, 531; Norton v. Norton, 5 Cush. 524; Freeman v. Burnham, 36 Conn. 469; Babcock v. Eckler, 24 N. Y. 623; Van Wyck v. Seward, 6 Paige, 62; 18 Wend. 375; Loeschigk v. Hatfield, 5 Robert. 26; Chambers v. Spencer, 5 Watts, 406; Wilson v. Howser, 12 Pa. St. 109; Ellinger v. Crowl, 17 Md. 361; Kuhn v. Stansfield, 28 Id. 210; Wilson v. Buchanan, 7 Gratt. 334; Hunters v. Waite, 3 Id. 26; Crambaugh v. Kugler, 3 Ohio St. 544; Enders v. Williams, 1 Metc. (Ky.) 346; Mitchell v. Berry, 1 Metc. 602; Lowry v. Fisher, 2 Bush, 70; Gridley v. Watson, 53 Ill. 186; Stewart v. Rogers, 25 Iowa, 395; Filley v. Register, 4 Minn. 391; Doughty v. King, 2 Stockt. Eq. 396; Emery v. Vinall, 26 Me. 295; Koster v. Hiller, 4 Ill. App. 21; Lill v. Brant, 6 Id. 366; Fellows v. Smith, 40 Mich. 689; Crawford v. Kirksey, 55 Ala. 282; Lockhard v. Beckley, 10 W. Va. 87; Rose v. Brown, 11 Id. 122; Cowen v. Alsop, 51 Miss. 158; Offutt v. King, 1 MacArthur, 312; Haston v. Castner, 31 N. J. Eq. 697; Dewey v. Moyer, 72 N. Y. 70.

[1] Carpenter v. Carpenter, 25 N. J. Eq. 194; Mattingly v. Wulke, 2 Ill. App. 169.

[2] Carhart v. Hurshaw, 45 Wisc. 340; Mattingly v. Nye, 8 Wall, 370.

[3] Mackay v. Douglas, L. R., 14 Eq. 106, 118–121; Case v. Phelps, 39 N. Y. 164; Carr v. Breese, 81 Id. 584, 588–591; Mullen v. Wilson, 44 Pa. St. 413; Monroe v. Smith, 79 Id. 459. In

may be laid down as a doctrine generally accepted, that if a person, being at the time indebted, makes a voluntary conveyance of his property to such an extent that he is left actually insolvent, or wholly unable to pay his existing debts, or that it is reasonable to suppose he contemplated his consequent inability to pay, or even that it is reasonably doubtful whether he is able to meet his obligations, then the conveyance will be fraudulent and void as against his subsequent as well as his existing creditors. The inference of a fraudulent intent must always depend upon there being an amount of property remaining after the voluntary conveyance, reasonably sufficient to defray all of the grantor's existing liabilities; and each case must, therefore, stand upon its own particular circumstances.[1]

Mackay v. Douglas, *supra*, V. C. Malins, after a careful review of the authorities holds, that a voluntary settlement, whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there were no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect. When a voluntary settlement is made on the eve of the settlor's engaging in trade the burden rests upon him of showing that he was in a position to make it. In order to set aside such a settlement, it is not necessary to show that the settlor contemplated becoming actually indebted; it is enough if he contemplated a state of things which might result in insolvency or bankruptcy. The reason for this particular rule is, that the person being about to engage in a hazardous business, must be considered as contemplating the probability of becoming unsuccessful, and indebted, and as attempting to secure his property against such possible, or probable loss; it is in fact an attempt to throw all the hazard of his business upon his expected creditors.

[1] Spirett v. Willows, 3 De G. J. & S. 293; Ware v. Gardner, L. R., 7 Eq. 317; Crossley v. Elworthy, Id. 12 Id. 158; Shand v. Hanley, 71 N. Y. 319; Savage v. Murphy, 34 Id. 508; Phillips v. Wooster, 36 Id. 412; Dunlap v. Hawkins, 59 Id. 342; Carr v. Breese, 81 Id. 584; Jencks v. Alexander, 11 Paige, 619, 623; Bank of U. S. v. Housman, 6 Id. 526; Kirksey v. Snedecor, 60 Ala. 192; Lockhard v. Beckley, 10 W. Va. 87; Rose v. Brown, 11 Id. 122; Claflin v. Mess, 30 N. J. Eq. 211; Kane v. Roberts, 40 Md. 590; Monroe v. Smith, 79 Pa. St. 459; Ammon's Appeal, 63 Id. 284; Conley v. Bentley, 87 Id. 40; Nichol v. Nichol, 4 Baxt. (Tenn.) 145; Churchill v. Wells, 7 Coldw. 364. If an express actual intent to hinder or defraud creditors generally is shown, subsequent as well as existing creditors are entitled to impeach the conveyance. Clark v. French, 23 Me. 221; Marston v. Marston, 54 Id. 476; Wyman v. Brown, 50 Id. 139, 148; Carter v. Grimshaw, 49 N. H. 100; Coolidge v. Melvin, 42 Id. 510, 533, 534; Smyth v. Carlisle, 17 Id. 417; 16 Id. 464; McConihe v. Sawyer, 12 Id. 396, 403; McLane v. Johnson, 43 Vt. 48; Winchester v. Charter, 102 Mass. 272; 97 Id. 140; 12 Allen, 606, 610; Livermore v. Boutelle, 11 Gray, 217; Savage v. Murphy, 8 Bosw. 75; Cramer v. Reford, 17 N. J. Eq. 367; Mullen v. Wilson, 44 Pa. St. 413; Moore v. Blondheim, 19 Md. 172; Lowry v. Fisher, 2 Bush. 70; Nicholas v. Ward, 1 Head. 323; Horn v. Volcano etc. Co., 13 Cal. 62; Dewey v. Moyer, 72 N. Y. 70, 76; Day v. Cooley, 118 Mass. 524.

On the other hand, if there is no actual intent to defraud, the mere fact that a voluntary conveyance may be presumptively fraudulent against existing creditors, does not render it fraudulent as against subsequent creditors. While a *prima facie* presumption against the validity of the

As a direct result from this doctrine, the rule has been well established that a post-nuptial settlement upon a wife or children, even when the settlor is entirely free from debt, must be reasonable in its amount and not disproportioned to his whole property. If the settlement is, as originally it must have been, in the form of property conveyed to trustees for the wife's separate use, courts of equity will not aid her in enforcing it when unreasonably large. If the legal title is conveyed directly to her, there is still danger lest the husband should obtain credit upon his apparent or supposed ownership.[1]

§ 974. **Conveyances in Fraud of Subsequent Purchasers.** By the statute 27 Eliz., c. 4, made perpetual by 39 Eliz., c. 18, § 31, all conveyances of hereditaments for the intent and purpose to deceive purchasers are made void as against them; and the same provisions have been substantially enacted in the United States.[2] The true meaning and interpretation of this statute were for a considerable period of time unsettled by the English courts. The doubt was whether it extended to all voluntary conveyances, or whether it avoided only those which are made with a fraudulent intent, and therefore furnished protection only to subsequent *bona fide* purchasers without notice. The rule was finally settled, and still prevails in England, that the statute applies to and avoids all voluntary conveyances as

voluntary deed may arise in favor of the grantor's existing creditors, no such presumption exists on behalf of his subsequent creditors. These latter can not impeach such a transfer merely because the former can. Howe v. Ward, 4 Greenl. 195; Kendall v. Fitts, 22 N. H. 1, 6; Smith v. Smith, 11 Id. 80; Parsons v. McKnight, 8 Id. 35, 37; Carlisle v. Rich, Id. 44, 50; Converse v. Hartley, 31 Conn. 372, 380; Babcock v. Eckler, 24 N. Y. 623; Baker v. Gilman, 52 Barb. 26; Ward v. Hollins, 14 Md. 158; Enders v. Williams, 1 Metc. (Ky.) 346; Todd v. Hartley, 2 Id. 206; Hurdt v. Courtenay, 4 Id. 139; Nicholas v. Ward, 1 Head. 323; Webb v. Roff, 9 Ohio St. 430; Lyman v. Cessford, 15 Iowa, 229; Fifield v. Gaston, 12 Id. 218; Whitescarver v. Bonney, 9 Id. 480.

[1] When the deed of gift to the wife is immediately put on record, this is of course a fact tending to show good faith; failure to record is a plain badge of fraudulent intent. Carr v. Breese, 81 N. Y. 584, 591 (one half of the husband's property not unreasonable); Babcock v. Eckler, 24 Id. 623 (more than half held not unreasonable); Carpenter v. Roe, 10 Id. 227; Wickes v. Clark, 8 Paige, 161; Mellon v. Mulvey, 23 N. J. Eq. 198; Ammon's Appeal, 63 Pa. St. 284.

[2] The English statute provides that all fraudulent, feigned, and covinous conveyances, gifts, grants, charges, uses, and estates, of lands, tenements, or hereditaments, made for the purpose to defraud and deceive such persons or bodies as have purchased, or shall afterwards purchase, in fee simple, fee tail, for life, lives, or years the same estates, or to defraud and deceive such as have purchased or shall purchase any rent, profit, or commodity out of the same, or any part thereof, shall be deemed (only as against the defrauded purchaser having purchased for money or other good consideration, his heirs, administrators, and assigns), to be utterly void.

This statute only declared and aided a jurisdiction of equity, which existed before it, and which has not been displaced by it. See Perry Herrick v. Attwood, 2 De G. & J. 21.

against subsequent purchasers for a valuable consideration, even though such conveyances were made in good faith without any actual fraudulent intent, and though the subsequent purchasers for value had notice thereof.[1] The same interpretation of the statute and the same general doctrine have been accepted by a portion of the American decisions.[2] The current of American authority, however, is opposed to this broad construction, and limits the operation of the statute to prior voluntary conveyances made with a fraudulent intent, and its protection to subsequent purchasers for a valuable consideration and without notice. The doctrine which may properly be called American is as follows: Conveyances are not void under the statute merely because they are voluntary, but because they are fraudulent, and the fraudulent intent may be inferred in the same manner and under the same circumstances, as against subsequent creditors. A voluntary gift of property is valid as against subsequent purchasers and all other persons, unless it was fraudulent when executed; and a subsequent conveyance for value is evidence of fraud committed in the former voluntary conveyance, but not conclusive evidence. It results that a voluntary gift made when the grantor is not indebted, in good faith, and without intent to defraud subsequent creditors or purchasers, is valid as against a subsequent purchaser for a valuable consideration with notice.[3] What constitutes a purchase for value without notice, and what is a valuable consideration, in cases arising under this statute, are determined by the rules contained in the preceding section upon that subject. In order that the statute may apply and uphold a subsequent conveyance for value against a prior voluntary conveyance, it is necessary that both

[1] The English theory is that the statute conclusively presumes a fraudulent intent when the prior conveyance is voluntary. Pulvertoft v. Pulvertoft, 18 Ves. 84, 86; Buckle v. Mitchell, Id. 100, 111; Kelson v. Kelson, 10 Hare, 385; Daking v. Whimper, 26 Beav. 568; Perry Herrick v. Attwood, 2 De G. & J. 21; Doe v. Manning, 9 East, 59; and see Bayspoole v. Collins, L. R., 6 Ch. 228, 232. The subsequent purchaser must be one for a real valuable consideration and *bona fide*, although notice does not destroy his rights under the statute.

[2] Sterry v. Arden, 1 Johns. Ch. 261, 270; 12 Johns. 536; Sexton v. Wheaton, 1 Am. Lead. Cas. 50, 51.

[3] Beal v. Warren, 2 Gray, 447; Sanger v. Eastwood, 19 Wend. 514; Wickes v. Clarke, 8 Paige, 161; Foster v. Walton, 5 Watts, 378; Dougherty v. Jack, Id. 456; Lancaster v. Dolan, 1 Rawle, 231; Mayor v. Williams, 6 Md. 235; Tate v. Liggatt, 2 Leigh, 84; Footman v. Pendergrass, 3 Rich. Eq. 33; Brown v. Burke, 22 Ga. 574; Gardner v. Boothe, 31 Ala. 186; Corprew v. Arthur, 15 Id. 525; Coppage v. Barnett, 34 Miss. 621; Wells v. Treadwell, 28 Id. 717; Enders v. Williams, 1 Metc. (Ky.) 346; Aiken v. Bruen, 21 Ind. 137; Chaffin v. Kimball, 23 Ill. 36; Gardner v. Cole, 21 Iowa, 205; Prestidge v. Cooper, 54 Miss. 74; Pence v. Croan, 51 Ind. 336; Sexton v. Wheaton, 1 Am. Lead. Cas. 17.

the conveyances should come from the same grantor. An heir or devisee can not, therefore, by a conveyance for value, defeat a voluntary settlement made by his ancestor or testator.[1] What creditors, purchasers, and their representatives are entitled to equitable relief, and what remedies may be obtained by them, are questions which belong to subsequent chapters treating of remedies.

[1] Parker v. Carter, 4 Hare, 400, 409; Lewis v. Rees, 3 K. & J. 132; and see Sterry v. Arden, 1 Johns. Ch. 261; Anderson v. Green, 7 J. J. Marsh. 448. For the same reason a *bona fide* purchaser, for value and without notice from the prior voluntary grantee, would have a title superior to that of a subsequent purchaser from the original grantor.

PART THIRD.

THE EQUITABLE ESTATES, INTERESTS, AND PRIMARY RIGHTS RECOGNIZED AND PROTECTED BY THE EQUITY JURISPRUDENCE.

PRELIMINARY PARAGRAPH.

§ 975. The general nature of equitable estates and interests, as distinguished on the one side from legal estates, and on the other from mere equitable remedial rights or "equities," has been sufficiently described in the preceding volume.[1] In contemplation of courts of equity, equitable estates, according to their various degrees, are as truly property or ownership, as legal estates are property in contemplation of courts of law. In fact the entire dealing of equity with the subject of equitable estates, and the fundamental distinctions between equitable and legal conceptions and modes, are based upon the notion that equitable estates are in the truest sense property, and not mere rights of action—not mere rights to obtain certain equitable remedies. Even when the equitable estate is the result of some positive wrong-doing, when the legal estate has been vested in a third person by fraud, undue influence, breach of fiduciary duty, and the like, so that the original owner can only regain the title by means of a cancellation, he is nevertheless, in contemplation of equity, the equitable and true owner; his equitable estate in the subject-matter is a true property, capable of being devised and otherwise dealt with.[2] In short, the equita-

[1] See vol. 1, §§ 146–149.

[2] Stump v. Gaby, 2 De G. M. & G. 623, 630; Gresley v. Mousley, 4 De G. & J. 78, 90, 92, 93, *per* Turner, L. J.; Uppington v. Bullen, 2 Dr. & War. 184; Dickinson v. Burrell, L. R., 1 Eq. 337. In Stump v. Gaby, A., an owner of land, conveyed to his attorney, and subsequently by will confirmed the conveyance. After A.'s death his heir at law brought a suit to set aside the conveyance as voidable. Lord St. Leonards said: "I will assume that the conveyance might have been set aside in equity for fraud. What, then, is the interest of a party in an estate which he has conveyed to his attorney under circumstances which would give a right in this court to have the conveyance set aside? In the view of this court he remains the owner; and the consequence is that he may devise the estate, not as a legal estate, but as an equitable estate, wholly irrespective of all question as to any rights of en-

ble estate is often regarded by a court of equity as the real, beneficial, substantial ownership, while the corresponding legal estate is a mere form and shadow. Many important incidents connected with equitable estates have been considered in the preceding chapters, such as the relations of equitable with legal estates in the sections on "merger," "priorities," "*bona fide* purchase," some of the modes in which equitable estates may arise in the sections on "fraud," "mistake," and "accident," and the like. I purpose now to describe more directly the nature and characteristics of equitable estates, interests, and primary rights, and to state the rights and obligations with respect to them which devolve upon their owners. The entire discussion will comprise the following subjects: Trusts; equitable interests of married women; equitable interests arising from succession to a decedent; equitable conversion; mortgage of real and personal property; equitable liens; interests arising from equitable assignments; and contracts in equity.[1] To these will be added an account of the equitable jurisdiction over persons *non sui juris*.

try or action, leaving the conveyance to have its full operation at law, but looking at the equitable right to have it set aside in this court." In Gresley v. Mousley, *supra*, A. conveyed lands to his attorney under such circumstances that the deed could be set aside in equity. He afterwards died, having devised all his real estate to the plaintiff. Held, that the equitable estate passed by the devise to the plaintiff, and the full relief was granted.

[1] "Trusts" and "mortgages" are subjects of such vast extent, embracing such a multitude of details, and each requiring volumes for their adequate treatment, that I shall endeavor to present only their general and fundamental principles and doctrines; the attempt to do anything more within the limits of this treatise would be both unnecessary and unavailing.

CHAPTER I.

TRUSTS.

SECTION I.

ORIGIN OF USES AND TRUSTS.

ANALYSIS.

§ 976. The testament in the Roman law.
§ 977. *Fideicommissa* in the Roman law.
§ 978. Origin of uses.
§ 979. The use at law.
§ 980. The use in equity.
§ 981. Resulting uses; equitable theory of consideration.
§ 982. Double nature of property in land, the use and the seisin.
§ 983. The "statute of uses."
§ 984. Kinds of uses not embraced within the statute.
§ 985. A use upon a use not executed by the statute.
§ 986. Trusts after the statute; effect of the statute in the American states.

§ 976. **The Roman Law Testament.**—To explain the nature and extent of the equitable jurisdiction and jurisprudence with respect to trusts, some historical account of trusts themselves, of their introduction into the law of England under the name of "uses," and of the enormous changes which they made in the primitive conceptions of property in land, is necessary. The *elementary* notion of trusts, like so many other doctrines of equity, was borrowed from the Roman law. The Roman testament was quite unlike the last will of our own law. Its essential feature consisted in the naming or appointing some person or persons as heir, upon whom the entire inheritance of the testator devolved. This inheritance included not only the property of the deceased, but also his liabilities. The heir thus became the "universal successor" to the testator, acquiring title to all his assets, and becoming liable for all his debts. The fundamental conception was that the legal condition of the deceased, consisting both of rights and liabilities, was prolonged and imposed upon the heir; that death made no real break in the continuity of the testator's legal personality. Partly from rules of the ancient law, and partly from prohibitory statutes,

the Roman citizen was much restricted with respect to the persons whom he might appoint as his testamentary heir. He could not give his inheritance to an alien or *pregrinus* (*i. e.*, one not strictly a citizen), nor to a person proscribed, nor to a posthumous child not belonging to his own family, nor, with certain exceptions, to a woman.[1] To evade these restrictions, the method was contrived, during the latter period of the republic, of appointing a qualified person as heir, upon whom the inheritance would devolve according to legal rules, and of accompanying the appointment by a direction or request that this heir would as soon as he obtained the inheritance, transfer it to another specified person who was the real object of the testator's bounty, and who, although prohibited from being made heir, was not prohibited from receiving a transfer of property from a living person by way of gift. At first, the fulfillment of the testator's direction was left wholly to the heir's sense of honor, but in process of time the claim of the beneficiary was recognized and enforced by a magistrate.[2]

§ 977. **Fideicommissa.**—The inheritance thus given to the appointed heir in trust for another person, was termed a *fideicommissum*, the heir or trustee, the *fiduciarius*, and the beneficiary, the *fideicommissarius*.[3] As the heir trustee, although he might surrender the whole estate to the beneficiary, would still remain legally liable for all the debts of the deceased, since a transfer of the inheritance *inter vivos* would not transfer the

[1] Concerning the Roman testament, see Just. Inst., b. 2, tit. 10, §§ 1–14; tit. 13, §§ 1–7; tit. 14, §§ 1–6; Sandars' Trans., pp. 245–280.

[2] Just. Inst., b. 2, tit. 23, § 1; Sandars' ditto, pp. 337, 338; Institutes of Gaius, b. 2, §§ 246–259. Justinian's Institutes thus describe the progress of the beneficiary's right: "At first, *fideicommissa* were of little force; for no one could be compelled against his will to perform what he was only requested to do. When testators were desirous of giving an inheritance or legacy to persons to whom they could not directly give either, they then intrusted them to the good faith of some person capable of taking by testament; and *fideicommissa* were so called, because their performance could not be enforced by law, but depended solely upon the good faith of the person to whom they were intrusted. Afterwards the Emperor Augustus, having been frequently moved by consideration for certain persons, or on account of some striking instance of perfidy, commanded the consuls to interpose their authority. Their intervention being favored as just by public opinion, it gradually assumed the character of a regular jurisdiction, and *fideicommissa* grew into such favor that soon a special prætor was appointed to adjudicate in these cases." The proceedings before this prætor to enforce the trust did not belong to his "ordinary" jurisdiction, and were not conducted by means of *formulæ*, but fell under his "extraordinary" (i. e. equity) jurisdiction, and were decided by the magistrate himself without the aid of any *judex* or *arbiter*: See *ante*, vol. 1, Introd. Chap., §§ 4 and 6.

[3] The English word "*fiduciary*" should therefore always designate the trustee; to apply it to the beneficiary, as has been done by some writers, is clearly improper. The latin *fideicommissarius* can not be easily anglicized.

liabilities, he was accustomed to take from the beneficiary a contract of indemnity. To obviate the necessity of such a contract, "during the reign of Nero (A. D. 62), a statute known as the *senatus-consultum Trebellianum* provided that all actions which by law might be brought by or against the heir [trustee] should be permitted for or against the beneficiary. After this the prætor began to give equitable actions for or against the beneficiary as if he were the heir."[1] By this legislation, the equitable estate of the beneficiary was fully established and protected.[2] Although it is plain that the conception of a "use" was borrowed from this *fideicommissum* of the Roman law, and that the English chancellor followed in the footsteps of the Roman magistrate, yet beyond this mere elementary notion or suggestion there is little resemblance between the two species of ownership. Their essential differences are as marked as their superficial similarity; and it is a grave error to represent the entire equity jurisprudence concerning uses and trusts, as derived from the Roman law.[3]

§ 978. **Origin of Uses.**—Uses in the ordinary meaning of the term as designating those which are passive, seem to have been invented during the latter part of the reign of Edward III.[4] Like the Roman *fideicommissa* they were designed to evade the law; but unlike them they were resorted to at first for mere purposes of fraud—by the clergy to defraud the statutes of mortmain, and by the laity to defraud creditors or feudal superiors. Being free from many heavy feudal burdens, uses grew rapidly into favor, and it is said that during the reign of Henry V. the greater part of the land in England was held in this manner.[5] At the very outset these conveyances to use were

[1] Just. Inst., b. 2, tit. 23, § 4.

[2] Subsequent statutes were passed limiting the power of testators, with respect to the persons to whom as beneficiaries *fideicommissa* might be given, and providing that a fourth part of the inheritance might be retained by the heir. Just. Inst., b. 2, tit. 24. The law also permitted a testator to give any particular thing, as a slave, a piece of land, etc., as a *fideicommissum*. Justinian added stringent provisions for enforcing secret trusts by means of an oath administered to the heir. *Ibid*, b. 2, tit. 23, § 12. This, it will be seen, resembles the "discovery" of the English chancery procedure.

[3] In the ancient use and modern trust there are of necessity two distinct estates, the legal and the equitable, vested in different persons, and these *must* continue as long as the trust relation exists. In the Roman law there was no such division of ownership, no double simultaneous estates. Until he had transferred the inheritance, the heir possessed the only estate, and the beneficiary had only a right of action. After the inheritance was transferred, the beneficiary obtained in turn the whole and only estate in the portion thus transferred, while the heir, under the Trebillianian act at least, was left without either interest or liability.

[4] Spence Eq. Jur., v. 1, pp. 439–442.

[5] Spence, v. 1, pp. 439–442; 442–444. There were two forms of conveyance to use, which should be care-

made for the benefit of third persons. This mode having been established, conveyances were made for the benefit of the original owner, the feoffor. Thus A., being seised in fee, would convey the land by a legal feoffment to B. to the use of himself A. In this manner the owner in fee would convert his legal estate, which was subject to all the feudal burdens and common law liabilities, into an equitable estate unknown to the common law, which was freed from these burdens and restrictions, which could be devised by will and aliened without livery of seisin, and which, under the doctrines subsequently established by the court of chancery, gave him all the dominion, possession, rights, and powers belonging to the legal estate.[1]

§ 979. **The Use at Law.**—For a while the *cestui que use* had no means of redress in any court. The law courts, as a necessary consequence of common law doctrines, recognized no other estate than the legal one vested in the feofee. If the *cestui que use* had any legal right at all, it was neither a *jus ad rem* nor a *jus in re*, and so there was no common law form of real action by which he could recover possession of, or enforce any claim upon, the land itself. His only *possible* remedy would be an action for damages, upon contract express or implied, against the feoffee for the latter's violation of the trust.[2] Even this action was not generally maintainable upon common law principles, since there was no *privity* between the feoffee and

fully distinguished. By the one form land was conveyed upon a trust that the feoffee was to exercise acts of dominion over it for the benefit of the feoffor or of a third person—as for example, receiving the rents and profits and paying the feoffor's debts therewith. Such conveyances, made upon an *active* trust, had probably been known from a very early day. They were not regarded as objectionable, they were not referred to when the phrase "conveyance to use" was ordinarily employed, and they were not included in the provisions of the "statute of uses." By the second form a conveyance was made to a feoffee to the use of some religious corporation or of some private person, with no expectation that the feoffee was to exercise any dominion over the land, but with the assumption that the *cestui que use* was to have and enjoy all the rights and privileges of an owner, except that of holding the naked legal title, and that, to complete this arrangement, the feoffee was to convey the legal title whenever and to whomsoever the *cestui que use* should direct. It is this latter form of *passive* use which grew to be so important, and which is generally referred to under the designation of a "use" or "conveyance to use," and against which the statute of use was directed.

[1] Spence, v. 1, pp. 439–444; 447–449.

[2] All the common law actions for the recovery of land, or for the maintenance of any interest therein, were based upon the assumption that the plaintiff either had some *property* absolute or qualified in the land (*jus ad rem*), or that he had a right to some particular use of land belonging to another—an easement or servitude (*jus in re*). As the interest of the *cestui que use* was neither of these, he could enforce it by none of the common law *real* actions, and was therefore shut up to actions *ex contractu* for damages; but, as I show, even such a personal action could only be maintained by him under one special state of facts.

the *cestui que use* when the latter was a third person; whatever promise the feoffee had made, whatever legal obligation he had incurred, was to the feoffor and not to the *cestui que use*.[1] It was formally decided in the fourth year of Edward IV., that the common law courts had no jurisdiction over the use.[2]

§ 980. **The Use in Equity.**—There being no common law actions to which resort could be had, the rights of the *cestui que use* were, for a considerable time, purely moral, and were protected only through the authority of the clergy, acting as confessors, upon the consciences of those who held the legal title of land for the use of others.[3] No traces of applications to the court of chancery have been found in the early records prior to Henry V., but during his reign the court began to entertain such suits and to decree relief. In the reigns of Henry VI. and of Edward IV. the chancery jurisdiction was fully established, and was also recognized by the courts of law. In other words, the law courts, while refusing themselves to protect the estates of *cestuis que usent*, admitted the fact that such estates existed and were protected by the court of chancery.[4] The passive or permanent use as established in equity is thus described by Bacon when it is created in favor of the feoffor himself, and the description would apply to the case where it is created for the benefit of a third person by a slight change of language. He says: "The use consisted of three parts: 1. That the feoffee (trustee) would suffer the feoffor (*cestui que use*) to receive the profits; 2. That the feoffee, upon request of the feoffor (*cestui que use*), would execute (i. e. convey) the estates to the feoffor (*cestui que use*), or his heirs, or to any other by his directions; 3. That if the feoffee were disseised, and so the feoffor (*cestui que use*) disturbed, the feoffee would re-enter, or bring an action to recover the possession."[5]

§ 981. **Resulting Uses; Equitable Theory of Consideration.**—In addition to these express uses created by the inten-

[1] There are in the early records some traces of such actions brought in the common law courts; but I presume it will be found that they are all confined to cases where the use was declared for the benefit of the *feoffor* himself, where A. conveyed to B. to the use of A. In such a case alone would there be any *legal* liability of the feoffee to the *cestui que use*. Whenever A., upon a consideration moving from B., promises B. to do something for the benefit of C., the English courts have uniformly maintained the rule that C. can have no action on the contract against A., because there is no privity between them. The modern rule has been settled otherwise in most of the American states.

[2] Spence, v. 1, pp. 445, 446.

[3] This authority would be especially exerted where lands were conveyed to the use of religious corporations or persons.

[4] Spence, v. 1, pp. 445, 446. For an explanation of the theory upon which the early chancellors proceeded in awarding relief, see *ante*, vol. 1, §§ 428–431.

[5] Bacon's Reading on Uses, p. 9.

tional words of parties, courts of equity soon invented another class, consisting of several different species, but all depending upon the same fundamental principle, and to which the names implied, resulting, and constructive have been given. The underlying principle upon which all these species were based, is the equitable doctrine concerning consideration. This theory of consideration, adopted and promulgated by the chancellors, is one of the most just, most productive, and most beneficial conceptions of equity jurisprudence. It accomplished more perhaps than any other single doctrine in overthrowing the arbitrary dogmas of the common law concerning real property, and in building up the distinctive system of equitable estates and ownership. It is certainly very remarkable that the early chancellors, in the very infancy of equity jurisprudence, should formulate a principle so admirably comprehensive and wise, that it has been sufficient, in its subsequent development, to meet all the wants of an advancing civilization, and all the requirements of modern society. The common law notions of title and ownership rested mainly upon the observance of external forms. Equity first introduced the principle that in all the transactions of men concerning land—their transfers and bargains—the consideration is the essential fact which determines the real beneficial ownership, wherever the legal title may be vested. The consideration draws to it the equitable right of property; the person from whom the consideration actually comes, under whatever form or appearance, is the true and beneficial owner. This grand principle extends not only to dealings which are intentional and rightful, but to those which are fraudulent, or in any manner wrongful or unconscientious. When once introduced, it was easily carried through all those branches of equity jurisprudence which relate to property, real or personal, and it underlies all the modern doctrines of resulting and constructive trusts, and all the remedies by which the beneficial owner is enabled to follow his equitable property in the hands of third persons. In its origin the principle was applied to valuable or pecuniary consideration, but it was soon extended, with all of its legitimate results, to the good consideration of blood or love and affection between near relatives of the same family.[1] The theory as to consideration operated in

[1] It thus appears that the special rules which regulate resulting trusts from the payment of the purchase price between parent and child, etc., are not, as they have been regarded by some writers, exceptions to the general doctrine; they are the necessary consequences of the one universal principle which regards valuable consideration between strangers, and good

the development of uses in the following manner. Prior to the statute of uses in the reign of Henry VIII., a gift of land to a person and his heirs accompanied by livery of seisin—that is a transfer by feoffment—was effectual in *law* to convey the entire estate without any consideration. The law did not require a consideration, and moreover if a deed or charter of feoffment was delivered, its seal raised a conclusive presumption of a consideration.[1] Equity broke through this doctrine by means of its principle concerning consideration. It established the rule that if a conveyance of the fee was made without any use being declared, and without any consideration, although the legal title passed to the feoffee, a use *ipso facto* arose and resulted in favor of the feoffor; so that having parted with the legal estate, he remained clothed with all the equitable interests, rights, and authority which the court of chancery gave to the *cestui que use;* the equitable estate in fee vested in him.[2] This rule, however, did not apply to conveyances between parent and child and other near family relatives, since the "good" consideration of blood or marriage relationship operated between such persons, in the same manner as valuable consideration between strangers, to transfer the whole estate legal and equitable free from any resulting use.[3] As a corollary to the foregoing rule it was further settled, that whenever an owner conveyed land to a feoffee upon some particular use declared in favor of a third person, so much of the use as had not been disposed of resulted back to himself. In other words, if the use declared in favor of the third person did not for any reason equal in extent and exhaust the legal estate given to or held by the feoffee, then a use for the residue or surplus of such estate resulted to the feoffor.[4] Carrying out the same principle of consideration in cases of *purchase*, equity also established the doctrine that, where no declaration of use was made so as to control, a use arose in favor of the person from whom the consideration came, whatever position he might occupy with respect to the legal title. In pursuance of this doctrine, where a purchase was made by one person in the name of another, the party receiving the legal title held it for the use of the one who advanced or

consideration between members of the same family, as the sources of equitable rights of ownership. A beautiful consistency runs through all the rules of equity concerning resulting trusts.

[1] Spence, v. 1. pp. 449, 450.

[2] Ibid, pp. 450, 453.

[3] Ibid, p. 450.

[4] Spence, v. 1, pp. 451–453. This particular rule applied to every condition of circumstances, both where the use in favor of the third person *wholly* failed for any reason to be operative, and where it partially failed to exhaust the estate held by the feoffee.

paid the price. Here also an apparent but not a real exception arose from the fact that good consideration of blood and marriage operated between near relatives in the same manner as a money consideration between strangers. In case of a purchase by a parent in the name of his child, no use was held to result for the benefit of the parent paying the price, but the purchase was presumptively regarded as an advancement.[1] As a second illustration of the same general doctrine, whenever an owner agreed for a valuable consideration to sell his estate, although there was no conveyance, and there were no words of inheritance in the contract, equity declared that a use was created in favor of the vendee by means of the consideration, and that the vendor held the legal title as his trustee. The same rule was extended to cases between near relatives where the consideration was that of marriage or blood. If a person, on consideration of marriage or blood, covenanted to settle an estate on an intended husband or wife, or on his children, or other nearest blood relatives, equity held that a use was thereby created in favor of the husband, wife, children, or relatives, and treated the covenantor as a trustee for their benefit.[2] Finally, the principle of consideration was extended by analogy to cases of fraud, actual or constructive, accident, and mistake.[3] This last application of the doctrine became, in time, the most efficient means in the hands of courts of equity for working substantial justice in disregard of legal forms. Whenever one person through mistake, or fraud, or in violation of fiduciary relations, obtained the legal title and apparent ownership of property which in justice and good conscience belonged to another, such property was immediately impressed with a use in favor of the latter equitable owner.[4]

§ 982. **Double Nature of Property in Land; the Use and the Seisin.**—From these doctrines concerning express uses, and especially concerning those implied from the acts or omissions of parties, it appears that equity at an early day introduced the notion of a *use* connected with and forming a part of *every* ownership of land. The very conception of property in land was thus changed from its primitive unity and simplicity, and it was made to involve, as an essential element, the notion of the use in connection with the mere legal proprietorship and seisin. According to this theory, every ownership—property itself—consisted of a legal title and of a

[1] Spence, v. 1, pp. 451–453.
[2] Ibid.
[3] Spence, v. 1, pp. 453, 454.
[4] Ibid.

use. These two might be combined and held by the same person, and their union would thus constitute the highest or ideal dominion; or they might be, and often were, separated, and held by different persons; but of the two the use was the more important, since it represented the real, substantial usufructuary proprietorship, while the other might be the naked legal estate, drawing after it, or conferring, no beneficial rights of enjoyment whatsoever. While the legal title and seisin always existed in some person, and remained subject to the common law dogmas, the use, being a creature of equity, was entirely free from the feudal burdens, and from the restrictions growing out of the common law theory as to seisin.[1] It even lacked some other common law incidents, like dower. It was descendible like the legal estate; but this was substantially the only feature of uses in which the early chancellors applied the maxim *æquitas sequitur legem*.[2] In every other respect they disregarded the narrow dogmas of the common law, and seemed intent on building up a system of landed ownership which should, as far as practicable, satisfy the needs of commerce, and at the same time maintain the dignity of families and the supremacy of the aristocracy.[3]

§ 983. **The Statute of Uses.**—Several statutes were enacted from time to time designed to prevent some of the particular effects produced by uses, and especially the statutes of mortmain were extended so as to prohibit uses in favor of ecclesiastical corporations; but it was not until the reign of Henry VIII. that any legislative attempt was made to destroy them. That monarch became exceedingly displeased at his losses of revenue resulting from the practical abrogation of wardships and other feudal incidents, and determined to cut up the cause of the evil, as he regarded it, from the very roots. In the twenty-third year of his reign, he procured a bill to be introduced into parliament which would have limited the power of conveying land

[1] For example, the use might be devised or aliened without livery of seisin; it might be cut up into different parts; it might be created or conveyed so as to take effect upon future contingencies; it might be limited in fee after a prior limitation in fee. A use could be declared to commence *in futuro;* provision could be made for revoking uses declared in favor of certain persons or for certain objects, even though in fee, and for substituting others in their place; a use could be declared by a husband for the benefit of and given to his wife; and even could be created by an owner in his own favor, and so as to take effect in himself. While the use could thus be created and conveyed upon future and contingent limitations, in violation of the strict common law rules respecting the creation of legal estates as contingent remainders, the *legal* title and seisin were conceived of as always vested in some person, ready at the proper time to be united with the use, and thus to produce in the holder of the two a perfected and complete ownership.

[2] See *ante*, vol. 1, §§ 425–427.

[3] Spence, vol. 1, pp. 454–456.

to uses; it passed the house of lords, but was rejected by the commons.[1] In the twenty-seventh year of his reign (A. D. 1535) he introduced a second bill which he doubtless supposed would be effectual. It was drawn up with great care by some of the most distinguished lawyers of the time. The preamble with which it opens describes the evil nature and effects of uses from the monarch's point of view in the most sweeping and condemnatory manner.[2] From the vigorous denunciations of the preamble, we should naturally suppose that the enacting part would have been equally violent and sweeping—that, like statutes of many American states, it would in express terms have abolished all uses or confidences, and have prohibited the conveyance of land upon trust or to the use of any one, or in any other manner than by the common law mode of feoffment and livery of seisin. For some reason, which has never been explained by the legal writers, the statute attempted no such thing. It did not forbid conveyances to uses, but on the contrary assumed that they

[1] Spence, vol. 1, pp. 461, 462–465.

[2] The preamble represents uses as an unmitigated evil, as a constant source of fraud and covin; it recites the effects which they produce in abolishing the feudal incidents of property, and stigmatizes them as crying grievances; it laments "the trouble and unquietness and utter subversion of the ancient laws of the realm" resulting from "the imaginations and subtle inventions and practices" which were known as uses and confidences.

I have said in the text that no sufficient reason for the halting nature of the enacting clause as compared with the fierce assaults of this preamble, has ever been given by the text-writers. It is certainly impossible that the learned lawyers who drew up the statute did not or could not foresee the construction which would be put upon it by the courts; they knew, of course, the cases which were omitted from its operation, and they must have anticipated the contrivance by which the court of chancery so soon evaded the only restrictive provision which they introduced. I venture to suggest, as a solution of the difficulty, and as an explanation of the whole statute, that while the preamble expressed the feelings and wishes of the king, the whole act was intentionally and most carefully drawn so as to blind him, and lead him to suppose that his old feudal privileges would be restored, but at the same to accomplish *no real change* in a system of land ownership which had become firmly established, and was sustained by an overwhelming preponderance of public opinion throughout the realm. The history of the time shows that parliament seldom, if ever, dared *openly* to resist and defeat the clearly expressed will of Henry VIII. The quibble by which the court of chancery, taking advantage of the narrowness of the common law tribunals, evaded the intent of the statute as expressed in its preamble, and restored, or rather preserved, the whole system of equitable trust estates, substantially as they existed before the act, would never have been endured unless the system itself had been fully approved by the general opinion of the nation and by the parliament itself. This is evident from the fact that parliament did not in the least interfere to check the legislative work of chancery by which the statute was virtually avoided. All these facts prove most conclusively that the clerical chancellors had built up an harmonious and consistent system of equitable land ownership, founded upon general and just principles, which was greatly preferred by the nation itself to the harsh and narrow doctrines of the common law. The only important doctrine of the common law which the chancellors shrank from attacking, was that concerning descent and inheritance.

would continue as before. The only change or relief which it proposed was a contrivance "to turn the equitable estates of the *cestuis que usent* into legal estates." This it accomplished by a provision that in certain classes of conveyances to use, a legal estate of the same kind and extent as the use, should by virtue of the statute immediately pass to and vest in the *cestui que use*, so that he would at once acquire the legal title and ownership of the same degree, in place of the mere equitable title and ownership which he would formerly have held under the name of "the use." And what is still more strange, the operation of this provision was confined to cases where the land was so conveyed or held that the feoffee or other holder of the legal estate was *seised* of it to the use of another—that is, where the feoffee or other holder of the legal estate had the land in fee, fee tail, or for life; all other possible cases were left untouched by an enactment which promised so much in its preamble.[1]

§ 984. **Uses not Embraced within the Statute.**—Notwithstanding this statute, the equitable estates of the same nature as uses continued under the name of trusts. In the first place, many species of existing uses were wholly untouched by the statute. The general doctrine was established that when any control or discretion is given to the feoffee or trustee in the application of the rents and profits, or where he is required to do any specific acts in regard to the land, and in all similar instances of *express active* trust, the legal estate remains in the feoffee or trustee to enable him to perform the trust reposed.[2] All such cases, though perhaps within the letter, were held not to be within the design and scope of the statute. Secondly,

[1] The following is the operative clause, unnecessary repetitions only omitted: Be it enacted, "Where any person or persons *stand or be seized* * * of any lands, tenements, or other hereditaments, to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, etc., * * that in every such case all such person or persons that have * * any such use, confidence, or trust in fee simple, fee tail, for life, or for years, or otherwise * * shall from henceforth stand and be seized and adjudged in lawful seizin, estate, and possession, of and in the same lands, tenements, and hereditaments * * of and in such like estates, as they had or shall have in use, trust, or confidence of or in the same; and the estate that was in such person or persons that were or shall be seized of any lands, tenements, or hereditaments to the use or trust of any such person or persons, shall be from henceforth adjudged to be in him or them that have, or hereafter shall have, such use or trust, after such quality, manner, etc., as they had before in or to the use or trust that was in them."

[2] As examples, where the trustee is directed or empowered to pay annuities, or to make repairs, or to maintain the *cestui que use;* or the trust is to reconvey the land to another, or to sell it for the purpose of raising a fund to pay debts or legacies, and the like. Wright v. Pearson, 1 Eden, 119, 125, *per* Lord Northington; Nevil v. Saunders, 1 Vern. 415; Pybus v. Smith, 3 Bro. Ch. 340; Shapland v. Smith, 1 Id. 75; Harton v. Harton, 7 T. R. 652, 654; Silvester v. Wilson, 2 Id. 444, 450.

where only a term of years is conveyed, or assigned to, or is held by one person to the use of another, it was decided that the statute does not operate, but that the legal and equitable estates remain distinct; since the language is, "where any person is *seized* to the use of," and the courts gave the most technical and narrow interpretation to the word "seized."[1] Thirdly, the statute did not purport to interfere with uses or trusts of things in action, or in other kinds of personal property.[2] Finally, the jurisdiction of chancery over the various uses which are created by implication or operation of law—the resulting and constructive uses—was held to be unaffected by the statute.[3] The operation of the statute was thus confined to one class of uses—passive uses in land where the feoffee or holder of the legal title was seised of the land to the use of another, that is, held an estate in fee, fee tail, or for life; but the use itself might be for a term of years, or for any higher interest.

§ 985. **A Use upon a Use not Executed by the Statute.** Even the operation of the statute in this single class of express passive uses was soon defeated by the combined action of the law and equity courts. If an estate was given to A. in fee to the use of B. in fee, then by the express command of the statute the legal estate passed through A. as a mere conduit, and became vested in the *cestui qui use* B. The statute said nothing in terms of a conveyance in fee to A. to the use of B. in fee, to the use of or in trust for C. in fee. Such a form of conveyance, or one identified with it in legal import, having arisen, the courts of law, either from a narrowness of construction most astonishing, or, which is probably the true explanation, from a deliberate design of interpreting the statute so as to give an opportunity for its complete evasion, held that there could be no use executed upon a use,[4] but that when the legal estate was carried, by virtue of the statute, to the first *cestui que use*, it must there remain vested in him. By

[1] Bacon's Reading on Uses, p. 42; Dyer, 369 a. This must not be confounded with the case where the holder of the legal estate is seised, but the use declared thereon in favor of some person is only for a term of years; e. g. A. being owner in fee "bargains and sells" to B. a term of years.

[2] Bacon's Reading, p. 43.

[3] Spence, v. 1, pp. 466, 467; 493–512; Gilbert on Uses, ed. by Sugden, introd. pp. lx, lxi, and p. 75, n. (5); Rigden v. Vallier, 2 Ves. Sen. 252, 257, *per* Lord Hardwicke.

[4] It may be proper to remark that the word "executed" in these old decisions, and as a technical term in English conveyancing, simply designates the passing of the legal estate through the first holder (the trustee), and vesting it in the person described as the *cestui que use*, performed by operation of the statute. In this sense of the word, the use is "executed" when the legal estate is vested in the *cestui que use*.

virtue of this ruling, the legal estate in the case supposed passed through A. and became vested in B., while C., who was intended by the conveyance to be the final and actual beneficiary, took nothing.[1] Here was an opportunity which the court of chancery could not overlook. It seized hold of the construction thus given by the law courts, and declared that, although the legal title was vested in B. by virtue of the statute, he could not, in good conscience, hold it for his own benefit, but he must hold it for the benefit of and in trust for C., who thereby obtained an equitable estate through the conveyance, which the court of chancery would maintain and protect.[2] This doctrine of chancery was acquiesced in at once, and has remain unquestioned by the courts to the present day. The practical result was that by making a slight alteration in the formal language of conveyances, so that an estate should be conveyed to or held by one person, to the use of a second, to the use of or in trust for a third, this third person would acquire an equitable estate distinct from the legal estate, vested by operation of the statute in the second party; and the whole system of express passive uses was thus restored, or revived to the same extent as before the passage of the act.[3]

[1] See Tyrrel's case, Dyer 155 a; 1 Co. Rep. 136 b, 137; Hopkins v. Hopkins, 1 Atk. 581, 590, 592, *per* Lord Hardwicke; Sanders on Uses, 92, 93.

[2] Hopkins v. Hopkins, 1 Atk. 581, 590, 591, *per* Lord Hardwicke; Willet v. Sandford, 1 Ves. Sen. 186, *per* Lord Hardwicke.

[3] As a matter of fact, in creating these express passive uses by conveyances *inter vivos*, the old form of feoffment to A. to the use of B. to the use of C. was seldom if ever employed after the "statute of uses," since it still required livery of seisin to be made to the feoffee A. Other forms of conveyance became universal in which the use upon a use was created by means of the equitable principle concerning the use arising and following the consideration. In family settlements where the good consideration of blood or affection is sufficient, if A., the owner of land, covenanted to stand seised of it for his son B., then a use thereby arose in favor of B., and the statute executed this use by passing the *legal* estate directly to B. who thereby became seised in law. If, however, A. wished to create a passive trust for his son B., he covenanted to stand seised of the land for C. to the use of or in trust for his son B., and the legal estate was thereby vested by the statute in C., but was held by him simply as a trustee for the intended beneficiary B. This came to be the universal form of deed for the purpose of creating passive trusts in family or marriage settlements. Wherever the conveyance was between strangers, so that a pecuniary consideration was requisite, another form of deed was adopted. As has already been stated, the doctrine had long been settled that if A., the owner of land, agreed to sell it to B. for a valuable consideration, a use was raised by the consideration in B.'s favor. Carrying out this doctrine, if a deed of conveyance from A. the owner to B. recited or admitted that a consideration had been received, this recital was regarded as evidence of the fact sufficient to raise a use in B.'s favor. Finally, it was settled that if in a deed of conveyance the words "bargain and sell" were employed as operative words of transfer, they conclusively imported a pecuniary consideration, and a use arose therefrom in favor of the grantee. A deed, therefore, from A. by which he bargained and sold land to B., created

§ 986. **Trusts after the Statute.**—Although the beneficial or equitable interests which had existed under the denomination of "uses" prior to the statute, were thus kept in existence, and continued to be under the exclusive jurisdiction of chancery, it was found convenient to give them a new name. The "use" had by virtue of the statute passed within the cognizance of the law courts, and thenceforth it played a most important part in the English theory and practice of conveyancing; and as such it does not fall within the scope of a treatise upon equity jurisprudence.[1] The beneficial interests which equity

the use in B.'s favor, which the statute executed by transferring the legal estate. If, however, A. designed to create a passive trust for B. as the beneficiary, his deed would be modified in form so as to be a bargain and sale of the land to C. to the use of or in trust for B. By operation of the statute the legal estate would thereby be vested in C., but would be held by him as a trustee for B., the intended beneficiary. This became the common form of deeds creating express passive trusts *inter vivos* where the parties were not near family relatives. Wherever an estate was given by will, and the testator wished to create a passive trust which should be valid notwithstanding the statute, express words were necessary declaring or creating in some manner one use upon another.

[1] The foregoing account of the text shows the origin of trusts as they exist in England under the statute of uses, and its judicial interpretation. The question then arises, how far does the statute exist in this country and affect the creation of trusts? Since the statute never applied to personal property, and under the judicial construction never embraced active uses and trusts, it follows that the question suggested practically means, how far do express *passive* trusts in lands exist in the states of this country, and how far does their creation depend upon the "statute of uses"? As such express passive trusts are very rare indeed in the United States, and are opposed to our prevailing notions of landed property and modes of dealing with it, this question is plainly more theoretical than practical. Still the operation of the statute has sometimes been discussed by American courts, and in one state in particular it has been a frequent subject for judicial inquiry. In several of the states, as will more fully appear in a subsequent paragraph, all express passive trusts in land and all express active trusts, with the exception of certain specified species, have been completely abrogated and abolished. The "statute of uses" clearly has no operation in those states, since it has been superseded by more destructive legislation. In some of them, certainly, and doubtless in all an attempt to create a passive trust, a conveyance or devise to A. in trust for B., would vest the whole estate directly in the beneficiary B.; while an attempt to create an active trust not authorized by the statute, would simply be void, except so far as it might operate as a valid "power in trust." (See *post*, §§ 1002.) In most of the remaining states, as Mr. Perry shows in his admirable treatise, the "statute of uses" has either been substantially re-enacted, or adopted and held to be in force as a part of the English legislation regarded as operative and binding in this country. He gives an abstract of the statutes in various states. Vermont. Ohio, Tennessee, and perhaps a few others, seem to be either wholly or partially excepted from this statement: See Perry on Trusts, § 299, and note, containing abstract of statutes; Gorham v. Daniels, 23 Vt. 600; Helfenstine v. Garrard, 7 Ohio, 275; Hutchins v. Heywood, 50 N. H. 491; French v. French, 3 Id. 234; New Parish v. Odiorne, 1 Id. 232, 236; Witham v. Brooner, 63 Ill. 344. In this class of states, therefore, there can be no doubt that a conveyance of land to A., for the use of or in trust for B., would operate to transfer the legal estate and vest it directly in B. For example, it is held in Georgia since a statute of 1866 concerning married women's separate estate, that a conveyance to a trustee for her in fee, with no remainder over, and no

recognized and protected, both those kinds which were held not to have been affected at all by the statute, and those which were

active duties prescribed for the trustee to perform, passes the legal title to her immediately; the trust is thus at once executed. Sutton v. Aiken, 62 Ga. 733. In Alabama it is held that under the "statute of uses," 27 Hen. VIII., which forms a part of the common law of the state, the extent of the trustee's legal estate is to be determined, not by words of inheritance, but by the whole object and extent of the trust upon which the land is conveyed; and when the objects of the trust are fully accomplished, the estate of the trustee ceases, and the whole title, legal and equitable, thereupon vests by operation of law in the beneficiary. Schaffer v. Lavretta, 57 Ala. 14; Tindal v. Drake, 51 Id. 574; see Booker v. Carlile, 14 Bush, 154. In states where the statute 27 Hen. VIII. has not been re-enacted or treated as actually in force, the same result is reached; mere passive uses are executed by virtue of the common law prevailing in those commonwealths; since the notion of the actual beneficial ownership kept permanently separated from the dry legal estate, is repugnant to American modes of dealing with real property. See Sherman v. Dodge, 28 Vt. 26, 31; Gorham v. Daniels, 23 Id. 600; Bryan v. Bradley, 16 Conn. 474, 483; McNab v. Young, 81 Ill. 11, 14; Guest v. Farley, 19 Mo. 147, 149; Coughlin v. Seago, 53 Ga. 250; Adams v. Guerard, 29 Id. 651; Bowman v. Long, 26 Id. 142, 147; Booker v. Carlile, 14 Bush, 154. Can an express passive trust in land be created in the American states? In several of the states, as has already been shown, it would be impossible, being expressly prohibited by statute. In other states, where the statute 27 Hen. VIII. prevails, would the interpretation first given in Tyrrell's Case, that a use upon a use is not executed, be followed? By some American courts the rule of Tyrrell's Case has been disapproved; see Thatcher v. Omans, 3 Pick. 521, 528; by other courts it has been approved. It has been held that where land was conveyed by a deed of bargain and sale to the use of a third person, the use was not executed, and so remained valid as a trust. See Guest v. Farley, 19 Mo. 147; Jackson v. Cary, 16 Johns. 302; Jackson v. Myers, 3 Id. 388, 396; Price v. Sisson, 2 Beasl. 168, 173; Croxall v. Sherrd, 5 Wall. 268, 282. I would remark that to give this effect to deeds in which the operative words are "bargain and sale," in my opinion violates the theory of conveyancing and of the effect and operation of deeds as established by modern statutes in a majority of the states. By modern statutes, in many, if not most of the states, deeds of land operate as grants to convey the entire legal estate and seisin, by force of their words of transfer, and sometimes their being recorded; and it is a misapprehension in the face of such legislation, to regard any deeds in these states as transferring the legal estate by virtue of the statute of uses. To say, therefore, in most of our states, that a deed of bargain and sale raises a use which the statute of uses executes, and that where a use or trust is expressly limited by a deed of bargain and sale, it is not executed by the statute, are, as it seems to me, wholly inconsistent with the simplicity of the law, as now established by statute, throughout the larger part of the United States. This view is not, however, at all antagonistic to the conclusion that an owner may, by deed or by will, give land in express terms to A., to the use of B., to the use of C., and that such a form of limitation would create a valid *passive* trust in C.'s favor. In some states, where there is no hostile legislation, this result may still be possible; although the question is almost entirely speculative and theoretical.

With regard to the cases held not to be within the force and operation of the statute 27 Hen. VIII., the American law is generally in harmony with that settled by the English courts. Trusts of personal property were not embraced within the statute, and such trusts are generally valid in this country, as in England, except so far as they have been regulated or restricted by statutes of various states. See Perry on Trusts, § 303; Denton v. Denton, 17 Md. 403 Express active trusts in land were also untouched by the statute, and they are generally valid in the United States as in England, with special statutory restriction, however, in several of the states. See Perry on Trusts, § 306;

rescued from its operation by the construction described in the last paragraph, were styled trusts; the person holding the legal

Morton v. Barrett, 22 Me. 257, 261; New Parish v. Odiorne, 1 N. H. 232; Chapin v. Univ. Soc., 8 Gray, 580; Stanley v. Colt, 5 Wall. 119, 168.

To this last statement concerning active trusts there is one marked exception. A doctrine has been settled by the courts of Pennsylvania very different in some respects from that prevailing in other states and in England, and unless this fact is carefully observed, the Pennsylvania decisions would be quite misleading as general authorities. Without entering into any examination of them I shall merely state these important points of difference, and cite some of the decisions by which they are illustrated.

One special rule established in Pennsylvania is that an express trust for the separate use of a woman, even where active duties are given to the trustee, so that the trust is really active, can not be created unless she is already married, or unless it is made in contemplation of her marriage. See Pickering v. Coates, 10 Phila. 65; Ash v. Bowen, 10 Id. 96; Ogden's Appeal, 70 Pa. St. 501; and cases cited below. This particular rule often operates in connection with others which are to be mentioned. The two main points of peculiarity in the law as settled in Pennsylvania, are the following: *First.* Some species of trusts are treated as executed by the statute as though they were wholly passive, so that the entire estate legal and equitable vests at once in the beneficiary, which by the general law of England and of this country are not thus executed, on the ground that they are in reality active trusts; as for example where land is given upon trust to convey it to the *cestui que trust.* See Bacon's Appeal, 57 Pa. St. 504; Rife v. Geyer, 59 Id. 393; Yarnall's Appeal, 70 Id. 335; Nice's Appeal, 14 Wright, 143; Barnett's Appeal, 10 Id. 392. *Secondly.* Several species of trusts are treated as *passive,* which by the general doctrine are undoubtedly active; certain trusts which require active duties by the trustees are held to be passive, and the whole estate to vest in the beneficiary. For example a trust to receive rents and profits and pay them over is clearly active, while a trust to "permit and suffer" the beneficiary to receive, is passive by the English law, Wagstaff v. Smith, 9 Ves. 520; but this distinction seems to be denied in Pennsylvania, and both are held to be passive. See Rife v. Geyer, 59 Pa. St. 393; and cases cited below. From the combination of these rules it follows that there may be trusts strictly active, which are not affected by the statute, and in which the legal and equitable estates are kept separate. But the leaning is strongly to regard trusts as passive; many instances are treated as passive which by the generally received law are active; and especially where an active trust for any reason fails of its purpose, or its purpose is accomplished, the tendency is strongly in favor of holding it executed and the estate as vested in the beneficiary. The following cases illustrate these tendencies: Keene's Estate, 81 Pa. St. 133; Pickering v. Coates, 10 Phila. 65; Ash v. Bowen, 10 Id. 96; Williams's Appeals, 83 Pa. St. 377; Huber's Appeal, 80 Id. 348; Phillips's Appeal, Id. 472; Ash's Appeal, Id. 497; Deibert's Appeal, 78 Id. 296; Delbert's Appeal, 83 Id. 462; Ashurst's Appeal, 77 Id. 464; Earp's Appeal, 75 Id. 119; Tucker's Appeal, Id. 354; Yarnall's Appeal, 70 Id. 335; Ogden's Appeal, Id. 501; Westcott v. Edmunds, 68 Id. 34; Megargee v. Naglee, 64 Id. 216; Parker's Appeal, 61 Id. 478; Dodson v. Ball, 60 Id. 492; Bacon's Appeal, 57 Id. 504; Koenig's Appeal, 57 Id. 352; Freyvogle v. Hughes, 56 Id. 228; Wickham v. Berry, 55 Id. 70; Shankland's Appeal, 11 Wright, 113; Barnett's Appeal, 10 Id. 392. In earlier decisions these views were carried to a still greater length. See Kuhn v. Newman, 2 Casey, 227; Whichcote v. Lyle's Ex'r, 4 Id. 73; Williams v. Leech, Id. 89; Price v. Taylor, Id. 95; Bush's Appeal, 9 Id. 85; Naglee's Appeal, Id. 89; McKee v. McKinley, Id. 92; Kay v. Scates, 1 Wright, 31; Rush v. Lewis, 9 Harris, 72. The foregoing resumé shows that the Pennsylvania cases can not always be taken as safe authority in other states upon the subject of active and passive trusts, and the extent to which they are executed by the "statute of uses."

title was termed the trustee; while the holder of the beneficial or equitable estate was ordinarily known as the *cestui que trust*, or in more modern nomenclature, as the beneficiary.

SECTION II.

EXPRESS PRIVATE TRUSTS.

ANALYSIS.

§ 987. Classes of trusts.
§§ 988–990. Express passive trusts.
§ 989. Estates of the two parties; liability for beneficiary's debts, etc.
§ 990. Rules of descent, succession, and alienation.
§§ 991–995. Express active trusts.
§ 992. Classes of active trusts.
§ 993. Voluntary assignments for the benefit of creditors; English doctrine.
§ 994. The same; American doctrine.
§ 995. Deeds of trust to secure debts.
§§ 996–999. Voluntary trusts.
§ 997. The general doctrine; incomplete voluntary trusts not enforced.
§ 998. When the donor is the legal owner.
§ 999. When the donor is the equitable owner.
§§ 1000–1001. Executed and executory trusts.
§ 1001. Definition and description.
§ 1002. Powers in trust.
§§ 1003–1005. Legislation of various states.
§ 1004. Judicial interpretation; validity of trusts.
§ 1005. Interest, rights, and liabilities of the beneficiary.

§ 987. **Classes of Trusts.**—Having thus explained the origin of trusts and their historical development until the jurisdiction substantially as it now exists had become firmly established, I shall now proceed to consider the various kinds and classes which are recognized by equity and form a part of its jurisprudence. All possible trusts, whether of real or of personal property, are separated by a principal line of division into two great classes: Those created by the intentional act of some party having dominion over the property, done with a view to the creation of a trust, which are express trusts; those created by operation of law, where the acts of the parties may have had no intentional reference to the existence of any trust—implied, or resulting, and constructive trusts. Express trusts are again separated into two general classes—private and public. Private trusts are those created by some written instrument, or in some

trusts of personal property by a mere verbal declaration, for the benefit of certain and designated individuals, in which the *cestui que trust* is a known person or class of persons. Public, or, as they are frequently termed, charitable trusts, are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals, in which the *cestuis que trustent* may be a portion or class of a public community—as for example, the poor or the children of a particular town or parish. As a general rule property of every kind and form, real and personal, may be made the subject of an express trust or of one arising by operation of law. All persons who have the capacity to hold and dispose of property can impress a trust upon it; and generally all persons capable of holding property may be made trustees.[1] All persons capable of holding property, even those *non sui juris*, and such persons only, may be beneficiaries.[2] Equity will enforce all lawful trusts. If a trust should be created for an illegal or fraudulent purpose, equity will not enforce it, nor, it seems, relieve the person creating it by setting aside the conveyance.[3] When, however, a trust is unlawful because it is one which the statute forbids, or which conflicts with the statute concerning perpetuities, and the like, the whole disposition is void.[4]

§ 988. **Express Passive Trusts.**—Express private trusts are of two kinds, passive or simple, and active or special. An express passive, or simple, or, as it is sometimes called, pure trust exists when land is conveyed to or held by A. in trust for B., without any power expressly or impliedly given to A. to take the actual possession and management of the land, or to exercise acts of government over it except by the direction of B.[5]

[1] It might not be expedient to appoint married women or infants trustees; but they *may* discharge the duties of the office; Lake v. De Lambert, 4 Ves. 593, 595; Smith v. Smith, 21 Beav. 385; *In re* Kaye, L. R., 1 Ch. 387. Property subject to an express or implied trust might devolve upon a person wholly *non sui juris*, as an idiot; equity would either enforce the trust against the property, or appoint another trustee.

[2] Wherever the common law rule prevails forbidding aliens from acquiring or holding real estate by an absolute right, they can not be made beneficiaries, and hold the equitable interest under a trust in their favor; but this rule does not prohibit trusts of personal property on behalf of aliens. Du Hourmelin v. Sheldon, 4 My. & Cr. 525; 1 Beav. 79; Sharp v. St. Sauveur, L. R., 7 Ch. 343, 352; Leggett v. Dubois, 5 Paige, 114; Hubbard v. Goodwin, 3 Leigh, 492; Atkins v. Kron, 5 Ired. Eq. 207; Taylor v. Benham, 5 How. 233.

[3] Unless perhaps the illegal purpose wholly fails to take effect. See Symes v. Hughes, L. R., 9 Eq. 475; Brackenbury v. Brackenbury, 2 J. & W. 391; Childers v. Childers, 1 De G. & J. 482.

[4] See *post*, §§ 1003-1005, concerning the legislative system in many of the states.

[5] Spence, v. 1, pp. 495-497; Cook v. Fountain, 3 Sw. 585, 591, 592, *per* Lord Nottingham; Lloyd v. Spillet, 2 Atk. 148. A trust merely to "permit

In such a case the naked legal title alone is vested in the trustee, while the equitable estate of the *cestui que trust* is to all intents the beneficial ownership, entitling him to the possession, the rents and profits, and the management and control according to the extent of his estate. These passive trusts are considered in equity as virtually equivalent to the corresponding legal ownerships; the trust is regarded rather as fastened upon the estate than upon the person of the trustee;[1] it is never suffered to fail for want of a trustee, either when the designated trustee dies, or refuses to act, or is an improper person.[2] As a general principle, the rules of law, excepting those growing out of the doctrine of tenure, have been applied by analogy as far as practicable to these corresponding passive trust estates.[3] A person can not hold property under a passive trust for himself, for generally, when the legal estate and an equal or less equitable estate unite in the same owner, a merger takes place; but this rule is not universal, since the two estates *may* be kept separate and subsisting in order to protect the equitable interests of the owner.[4] Such express passive trusts in land are certainly very infrequent in this country, although they may occasionally exist where not prohibited by statute.[5] Trusts in personal property, however, which are essentially passive, are not at all uncommon.[6]

and suffer" the *cestui que trust* to receive the rents and profits is not an active trust. Wagstaff v. Smith, 9 Ves. 520. For peculiar doctrine in Pennsylvania concerning passive trusts, see *ante*, note under § 986, and cases cited.

[1] Adair v. Shaw, 1 Sch. & Lef. 262, *per* Lord Redesdale.

[2] Gravenor v. Hallam, Ambl. 643; Pitt v. Pelham, 1 Chan. Cas. 176; Brown v. Higgs, 8 Ves. 561, 569; Newlands v. Paynter, 4 My. & Cr. 408; Att'y-Gen. v. Stephens, 3 My & K. 347; Lewis v. Lewis, 1 Cox, 162; and although no trustee was ever expressly appointed, or from any cause there may be no acting trustee, the person acquiring the legal interest in the property will be bound by the trust to which it is subject. *Ibid.* It is a fundamental principle of equity that "the trust follows the legal estate wherever it goes, except it comes into the hands of a *bona fide* purchaser for a valuable consideration without notice." Att'y-Gen. v. Lady Downing, Wilm. 1, 21, *per* Wilmot, C. J.

[3] Watts v. Ball, 1 P. Wms. 108; Burgess v. Wheate, 1 Eden, 177, 184, 195, *per* Sir T. Clarke, p. 223, *per* Lord Mansfield, p. 250, *per* Lord Northington; Cholmondeley v. Clinton, 4 Bligh, 1, 115, *per* Lord Redesdale.

[4] Brydges v. Brydges, 3 Ves. 120, 126; Wade v. Paget, 1 Bro. Ch. 363; Badgett v. Keating, 31 Ark. 400; Bolles v. State Trust Co., 27 N. J. Eq. 308; and see *ante*, section on merger, §§ 787, 788. A trust is not rendered void by the court appointing the *cestui que trust* the trustee. Rogers v. Rogers, 18 Hun, 409.

[5] They would probably most often appear in connection with the separate estates of married women. See Boyd v. England, 56 Ga. 598; Sutton v. Aiken, 62 Id. 733.

[6] For example, A. may deposit money in a bank in "trust for B.;" or may deposit in the name of B., "in trust for C.," and thus create a valid trust which is really passive, since the trustee is not charged with any duties of management, such as receiving the interest and paying it over; in fact, he holds the *corpus* of the property in trust for the beneficiary.

§ 989. **Estates of the Two Parties.**—The estate of the naked trustee in a passive trust, and *a fortiori* of the trustee in an active trust, is the only legal ownership, although it must be used, in equity, only for the purposes of carrying out the trust, and protecting the rights of the beneficiary. The trustee having the legal interest, is the proper person to bring actions at law and to do other things which can be done only by one having the legal estate.[1] The estate of the *cestui que trust*, while regarded in equity as the real ownership, is governed, so far as practicable, by the legal rules applicable to similar estates at law. The language of the instrument creating or declaring the trust is interpreted by courts of equity in accordance with the rules followed by courts of law. The interest of the *cestui que trust* is alienable; if real estate, it may be conveyed by ordinary deed; if personal, it may be assigned, but the rule is established in England that notice must be given to the trustee in order to perfect an assignment by a *cestui que trust* of personalty, and to protect the assignee.[2] The estate can not, by any restrictions annexed to the trust, be rendered inalienable, nor can it be stripped of other incidental rights of ownership.[3] It is also liable for the debts of the beneficiary.[4] It can not be so created that, while it is subsisting and enjoyed by the beneficiary, it shall be absolutely free from such liability. The trust may be so limited that it shall not take effect unless the beneficiary is free from debt, or that his estate shall cease upon his becoming insolvent, or upon a judgment being recovered against him, and shall thereupon vest in another person; but the *cestui que trust* can not *hold and enjoy* his interest entirely free from the claims of creditors.[5]

As illustrations, see Martin v. Funk, 75 N. Y. 134; Boone v. Citizens' Sav. B'k, 84 Id. 83; Weber v. Weber, 58 How. Pr. 255; Stone v. Bishop, 4 Cliff. C. C. 593; Rogers Locomotive Works v. Kelly, 19 Hun, 399.

[1] May v. Taylor, 6 Man. & Gr. 261. When money is deposited in a bank to the credit of A., in trust for B., A., or, upon his death, his administrator, is *prima facie* the proper person to demand and receive payment from the bank. Boone v. Citizens' Sav. B'k, 84 N. Y. 83; Stone v. Bishop, 4 Cliff. C. C. 593.

[2] This rule is adopted in only a portion of the American states. See *ante*, §§ 695–697, where the English and American cases are cited.

[3] Brandon v. Robinson, 18 Ves. 429; Rochford v. Hackman, 9 Hare, 475.

[4] Pratt v. Colt, 2 Freem. 139; Forth v. Duke of Norfolk, 4 Madd. 503; Hutchins v. Heywood, 50 N. H. 491; Kennedy v. Nunan, 52 Cal. 326.

[5] Nichols v. Levy, 5 Wall. 433, 441; Hallett v. Thompson, 5 Paige, 583; Bramhall v. Ferris, 14 N. Y. 41; Easterly v. Keney, 35 Conn. 18, 22; Dick v. Pitchford, 1 Dev. & Bat. Eq. 480. In Nichols v. Levy, *supra*, Swayne, J., said: "It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It can not be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited

These rules are subject to a most important exception in the case of the married woman's separate estate—property held upon trust for her separate use. It is the familiar doctrine with reference to such separate estate—the very essential element that it may be settled to her own separate use so as to be held by her entirely free from her husband's control and from the claims of his creditors. It is also the established doctrine, designed to protect her from the moral influence of her husband, that in creating the trust a clause may be inserted against "anticipation," by which her power of aliening her interest is taken away during her marriage; and, as the rule is generally accepted, the restraint of such clause may operate during any future as well as present marriage.[1]

§ 990. **Rules of Descent and Succession.**—The rules concerning descent, devolution, and succession, applied to the equitable estates of beneficiaries, are generally the same which regu-

by his insolvency with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go." In the more recent case of Nichols v. Eaton, 1 Otto, 716, the court went some further. A trust was created to pay income to A. during his life; if he became insolvent his interest was instantly to cease, and was to pass to and vest in another person; but in that case the trustees were authorized in their discretion, but without it being obligatory upon them, to apply a portion of the income to A.'s use. The court held that the discretion and authority thus given to the trustees did not render the disposition and limitation over void, nor the income liable to the claims of A.'s creditors after his insolvency. While the rule stated in the text is general, it has been adopted by some courts only in a modified form. In Pennsylvania property may be given by a third person to A. upon such a trust for his life that he has no control whatever over the property, and a proviso attached that his interest is to be free from all liability to his creditors is held to be valid and operative. The same result may be accomplished in the creation of the trust, by clothing the trustees with a discretion as to the amount of income which they shall apply to the use of the beneficiary. A. Keyser v. Mitchell, 67 Pa. St. 473; Rife v. Geyer, 59 Id. 393, 396; Shryock v. Waggoner, 4 Casey, 430; Brown v. Williamson's Ex'rs, 12 Id. 338; Eyrick v. Hetrick, 1 Harris, 488; Shankland's Appeal, 11 Wright, 113; Girard L. Ins. Co. v. Chambers, 10 Id. 485; Norris v. Johnston, 5 Barr, 287; Vaux v. Parke, 7 Watts & S. 19; Fisher v. Taylor, 2 Rawle, 33. But a person *sui juris* can not convey his property upon trusts for himself free from the claims of his creditors. Ashurst's Appeal, 77 Pa. St. 464; Mackason's Appeal, 6 Wright, 330. See, also, as to the extent to which the beneficiary's estate may be made free from liability, Leavitt v. Beirne, 21 Conn. 1, 8; Johnston v. Zane's Trustees, 11 Gratt. 552, 570; Markham v. Guerrant, 4 Leigh, 279; Hill v. McRae, 27 Ala. 175; McIlvaine v. Smith, 42 Mo. 45; Pope's Ex'rs v. Elliott, 8 B. Mon. 56.

[1] Hawkes v. Hubback, L. R., 11 Eq. 5; *In re* Gaffee's Trusts, 1 Macn. & G. 541; Rennie v. Ritchie, 12 Cl. & Fin. 204; Tullett v. Armstrong, 4 My. & Cr. 377; 1 Beav. 1; Baggett v. Meux, 1 Phil. 627; 1 Coll. 138; Shirley v. Shirley, 9 Paige, 363; Waters v. Tazewell, 9 Md. 291; Fears v. Brooks, 12 Ga. 195, 197; Fellows v. Tann, 9 Ala. 999, 1003. By some American courts, the clause against anticipation has been held valid only during the existing marriage. See Dubs v. Dubs, 31 Pa. St. 149; Wells v. McCall, 64 Id. 207; Apple v. Allen, 3 Jones' Eq. 120; Miller v. Bingham, 1 Ired. Eq. 423.

late corresponding legal estates.[1] Those rules, however, which result from the doctrine of tenure do not apply, and therefore it is settled in England that the equitable estate of the beneficiary in lands held in trust for him, is not subject to escheat, but the trustee holds the land absolutely.[2] As a consequence of the general doctrine, estates of inheritance held in trust for the wife are subject to the husband's curtesy;[3] but by a strange inconsistency of the English law, the wife had no dower in similar estates held in trust for her husband.[4]

§ 991. **Express Active Trusts.**—Active or special trusts are those in which, either from the express directions of the language creating the trust, or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the *cestuis que trustent*. They may, except when restricted by statute, be created for every purpose not unlawful, and, as a general rule, may extend to every kind of property, real and personal. In this class the interest of the trustee is not a mere naked legal title, and that of the *cestui que trust* is not the real ownership of the subject-matter. The extent and incidents of the rights held by the respective parties must, of course, vary with the nature of the trust itself and the duties which the trustee is called upon to perform. It is a universal rule, however, that the trustee's estate and power over the subject-matter are commensurate with the duties which the trust devolves upon him, and are sufficient to enable him to perform all those duties.[5] The trustee is gen-

[1] Burgess v. Wheate, 1 Eden, 177; Trash v. Wood, 4 My. & Cr. 324, 328 (descent); Price v. Sisson, 2 Beasl. 168, 174; Croxall v. Shererd, 5 Wall. 268, 281. The rule in Shelley's Case extends to trust estates. Jones v. Morgan, 1 Bro. Ch. 206, 222.

[2] Burgess v. Wheate, 1 Eden, 177; Onslow v. Wallis, 1 Macn. & G. 506; Sweeting v. Sweeting, 33 L. J. Ch. 211. It is doubtful whether this particular rule prevails in the United States; it should not upon principle, since with us the doctrine of escheat to the state is not in the least based upon the notion of tenure; see Matthews v. Ward, 10 Gill & J. 443, 454. Where the trust is one of personalty, on the death of the beneficiary intestate and without any next of kin, the crown or the state succeeds to his property, upon other grounds than that of common law escheat. Burgess v. Wheate, *supra;* Williams v. Lonsdale, 3 Ves. 752; Taylor v. Haygarth, 14 Sim. 8; Cradock v. Owen, 2 Sm. & Giff. 241.

[3] Roberts v. Dixwell, 1 Atk. 607; D'Arcy v. Blake, 2 Sch. & Lef. 387; Cooper v. Macdonald, L. R., 7 Ch. D. 288; Appleton v. Rowley, Id., 8 Eq. 139; Follett v. Tyrer, 14 Sim. 125; Morgan v. Morgan, 5 Madd. 408; Dubs v. Dubs, 31 Pa. St. 149; Cushing v. Blake, 30 N. J. Eq. 689.

[4] D'Arcy v. Blake, 2 Sch. & Lef. 387; Dixon v. Saville, 1 Bro. Ch. 325. A different rule generally prevails in the United States. See Cushing v. Blake, *supra.*

[5] Spence, vol. 1, pp. 496, 497; Lord Glenorchy v. Bosville, Cas. temp. Talb. 3; Williams's Appeals, 83 Pa. St. 377, 387; Delbert's Appeal, Id. 462. For the somewhat exceptional views maintained in some states concerning act-

erally entitled to the possession and management of the property, and to the receipt of its rents and profits; and in many cases he has, from the very nature of the trust, authority to sell or otherwise dispose of it. The interest of the beneficiary is necessarily more limited than in passive trusts, and it sometimes can not with accuracy be called an equitable *estate*. He always has the right, however, to compel a performance of the trust according to its terms and intent.

§ 992. **Classes of Active Trusts.**—Although active trusts may be created for a great number of special purposes, those which are the most frequent and important may be reduced to the four following generic classes: *First*, where the trust is simply to convey the property to some designated person, or class of persons.[1] *Second*, where the primary object is to sell or dispose of the entire trust property in some manner and to use the proceeds for some ulterior purposes.[2] In all instances

ive trusts, see *ante*, note under § 986. Trusts once active may be accomplished and become passive, and a question may then arise, whether the legal estate of the trustee still continues, or whether it passes to and vests in the beneficiary by operation of the statute of uses. If the existence and separation of the two estates did not originally depend alone upon the trustee's having active duties to perform—that is, if the trust was originally created for some other purpose beside the active duties on behalf of the beneficiary—then upon the accomplishment or ceasing of these active duties, the legal estate will not *ipso facto* vest in the beneficiary by operation of the statute. Perry on Trusts, § 351. But the beneficiary may then be entitled to a conveyance of the legal estate from the trustee. Sherman v. Dodge, 28 Vt. 26, 30; Leonard's Lessee v. Diamond, 31 Md. 536, 541. After a great lapse of time and a long-continued possession by the beneficiary or person representing his interests, a conveyance may be presumed. Leonard's Lessee v. Diamond, *supra;* Den v. Bordine, Spencer (N. J.), 394; Aikin v. Smith, 1 Sneed, 304. On the other hand, where the active duties conferred upon the trustee constituted the only ground for keeping the two estates separate and distinct, upon the ceasing of those duties the legal title will vest in the *cestui que trust* by operation of the statute. Perry on Trusts, § 351; Welles v. Castles, 3 Gray, 323. It is said that if all the beneficiaries are in existence and *sui juris* and consent, a court may decree the conveyance of the trust property to them, although the trust has not been completed nor ceased. Perry on Trusts, §§ 274, 922; Smith v. Harrington, 4 Allen, 566; Bowditch v. Andrew, 8 Id. 339; Culbertson's Appeal, 76 Pa. St. 145, 148; but see Douglas v. Cruger, 80 N. Y. 15, which holds that a court of equity has no power to decree the determination of an existing and valid trust. Such a conveyance is prohibited by the statutes of New York and of the other states which have followed the New York type of legislation.

[1] This species is often found in connection with other kinds. Trusts for investment and accumulation almost invariably terminate with a trust to convey the accumulations to specified beneficiaries; in trusts for applying rents and profits to particular uses, there is generally a provision for conveying the capital fund, at the expiration of the period limited, to some designated persons by way of remainder. Trusts merely to convey the property, unaccompanied by any other duties of the trustee, are uncommon. Such *dispositions* are very frequent in English marriage settlements, but they are usually accomplished by means of powers rather than by trusts.

[2] Among the most important instances belonging to this class are conveyances or assignments by a debtor upon trust to sell the property and

of this class, where the trust is to sell the corpus of the property and to distribute the proceeds among creditors, legatees, and the like, the beneficiaries plainly acquire no proper estate in the original trust fund prior to its sale; their right and interest attach to the proceeds of this fund, which are to be paid to or distributed among them. In order to make their right fully available and to guard their interest as much as possible against the large authority given to the trustees, equity has invented in such cases the doctrine of *conversion*, by which real property is regarded as personal, and personal property as real.[1] *Third*, this class includes all those trusts where the primary object is to hold and invest the entire property and its proceeds, and thus to accumulate for some ulterior purposes.[2] *Fourth*, this class includes all those trusts of which the primary object is to hold the corpus of the property, receive its rents, profits, and income, and apply them to some precribed uses.[3] More than one of

pay debts with the proceeds, including the official assignments made to assignees in bankruptcy, insolvency, and other analogous proceedings. Also, a devise or bequest of property by will, upon trust to sell, mortgage, or lease the same, and with the proceeds to pay the testator's debts, or legacies, or annuities, or other charges and liabilities, or to pay "portions" to daughters and younger sons. This last object, which is very common in England, is often found in family settlements as well as in wills. A trust to exchange lands, or to dispose of property, and with the proceeds purchase other kinds or forms, falls under the same class.

[1] It is in trusts of this form, to sell land and pay over the proceeds, and in those exactly opposite, to use money in the purchase of land which is then to be conveyed, that the doctrine of conversion finds its special field of operation. See Fletcher v. Ashburner, 1 Bro. Ch. 497; 1 Eq. Lead. Cas. 1118; Greenhill v. Greenhill, 2 Vern. 679; Guidot v. Guidot, 3 Atk. 254, 256; Wheldale v. Partridge, 5 Ves. 388, 396; Biddulph v. Biddulph, 12 Id. 161; Stead v. Newdigate, 2 Meriv. 521; Ashby v. Palmer, 1 Id. 296; Elliott v. Fisher, 12 Sim. 505; Griffith v. Ricketts, 7 Hare, 299; Farrar v. Earl of Winterton, 5 Beav. 1; Craig v. Leslie, 3 Wheat. 563; Peter v. Beverly, 10 Peters, 532, 534, 563; Gott v. Cooke, 7 Paige, 521, 523, 534; Lorillard v. Coster, 5 Id. 173, 218.

[2] Sometimes land or personal property is given on trust to receive the income, and continually to invest it in the purchase of other lands, or interest-bearing securities, during the period of the trust; sometimes land is given on trust to sell and to invest the proceeds in securities, and to reinvest the income in the same manner; sometimes personal property is directed to be converted into money, and the proceeds to be invested in lands, the income of which is to be accumulated by the constant purchase of other lands, etc. In all these forms provision is made for the disposition of the accumulated fund at the expiration of the period, in some manner on behalf of the beneficiaries. The periods for which such trusts may be created are now limited by statute in England and in this country, so as to prevent a "perpetuity."

[3] The forms of this class also are various. Real or personal property, or both, is sometimes given by will upon trust to hold the capital and apply the income to the payment of debts, legacies, annuities, etc.; property, real or personal, or both, is given by will or by deed in trust to receive the rents and profits and pay the same to, or apply them to the use of, designated beneficiaries during their lives, or for some specified period. In this manner provision is often made for wives in marriage settlements, and for widows and children by will.

these four general objects may be embraced in the same trust. In instances of the third and fourth classes, the beneficiaries may have a direct equitable interest in the trust property itself, which is plainly more than a *mere* right of action, but is not so substantial an estate as that held by the *cestui que trust* under a simple passive trust.

§ 993. **Assignments for the Benefit of Creditors.**— Among the active trusts which are quite frequent in this country, are voluntary and general assignments by failing debtors of their property to trustees upon trust to pay the creditors of the assignor.[1] The doctrine is settled in England that primarily such assignments do not create a trust nor clothe the creditors with the character of *cestuis que trustent;* they rather confer a power upon the trustee, and make him an agent for the debtor to dispose of the property under the debtor's directions. It follows from this view that until the assignment has been communicated to the creditors, it may be revoked, or altered, or superseded by the assignor at his own will.[2] But when the fact of such assignment has been communicated to creditors, and their position is altered by it, and especially if they have assented to it, then it becomes irrevocable as to such creditors, and they can enforce its trusts and take the benefit of its provisions in their behalf.[3] If creditors make themselves actual parties by executing the deed of assignment, it of course becomes irrevocable as to them, their rights under it are fixed.[4]

[1] These general assignments are not common in England, since they interfere with the modern bankrupt laws; so far as they do not conflict with those laws they are valid. In some of the states the whole ground is covered by local insolvent laws; in others, assignments for the benefit of creditors are strictly regulated and limited by statutes.

[2] Garrard v. Lauderdale, 3 Sim. 1; 2 Russ. & My. 451; Walwyn v. Coutts, 3 Meriv. 707; 3 Sim. 14; Acton v. Woodgate, 2 My. & K. 492; Browne v. Cavendish, 1 Jo. & Lat. 606; and see Brooks v. Marbury, 11 Wheat. 78.

[3] There is some discrepancy in the language of different decisions upon this point. Some seem to require that a creditor should do some affirmative act showing his assent; others appear to hold that after information of the assignment is communicated to a creditor his assent will be presumed, unless the contrary is shown—unless he indicates his dissent in some manner. Acton v. Woodgate, 2 My. & K. 492; Browne v. Cavendish, 1 Jo. & Lat. 606; Simmonds v. Palles, 2 Id. 489; Field v. Lord Donoughmore, 1 Dr. & War. 227; Biron v. Mount, 24 Beav. 642; Nicholson v. Tutin, 2 K. & J. 18; Kirwan v. Daniel, 5 Hare, 493, 499; Griffith v. Ricketts, 7 Id. 299, 307; Smith v. Hurst, 10 Id. 30; Cornthwaite v. Frith, 4 De G. & Sm. 552; Cosser v. Radford, 1 De G. J. & S. 585; Synnot v. Simpson, 5 H. L. Cas. 121, 133; Glegg v. Rees, L. R., 7 Ch. 71.

[4] Mackinnon v. Stewart, 1 Sim. N. S. 76, 88; Le Touche v. Earl of Lucan, 7 Cl. & Fin. 772; Montefiore v. Browne, 7 H. L. Cas. 241, 266. If the assignment prescribes a time within which it must be executed by the creditors, those who refuse to execute, and those who claim adversely to it, or act inconsistently with it, will be excluded from its benefits. Johnson v. Kershaw, 1 De G. & Sm. 260; Watson v. Knight, 19 Beav. 369; Field v. Lord

§ 994. **The American Doctrine.**—With a few exceptions the American courts have not adopted this English theory with respect to the nature of such assignments. The doctrine is generally settled in this country that voluntary general assignments for the benefit of creditors, if otherwise valid, are not mere agencies of the debtor; they create true trust relations, and the creditors are true beneficiaries. When once duly executed they are irrevocable; and the creditors on being informed of their existence, may take advantage of the provisions in their own favor, and may enforce the trusts declared, without making themselves parties, or doing any act indicating their own acceptance or assent.[1] Although the assignee is thus a trustee for the creditors, yet he is at the same time so far a representative of the debtor that he must be governed by the express terms of the trust; he can not indirectly modify the provisions of the assignment.[2] The doctrine generally prevails in the American states that, unless prohibited by statutes, voluntary general assignments by failing debtors for the benefit of their creditors, even when preferring individuals or classes among the beneficiaries, are valid. The necessary delay incident to the

Donoughmore, 1 Dr. & War. 227; Forbes v. Limond, 4 De G. M. & G. 298. But mere delay in executing the deed will not debar those creditors who do act under it or accept it. Nicholson v. Tutin, 2 K. & J. 18; Raworth v. Parker, 2 Id. 163; Whitmore v. Turquand, 3 De G. F. & J. 107; *In re* Baber's Trusts, L. R., 10 Eq. 554; Biron v. Mount, 24 Beav. 642.

[1] Ellison v. Ellison, 1 Eq. Lead. Cas. 423 (4th Am. ed.); Moses v. Murgatroyd, 1 Johns. Ch. 119, 129; Shepherd v. McEvers, 4 Id. 136, 138; Nicoll v. Mumford, Id. 522, 529; Pratt v. Thornton, 28 Me. 355; Ward v. Lewis, 4 Pick. 518, 523; New Eng. Bank v. Lewis, 8 Id. 113, 118; Pingree v. Comstock, 18 Id. 46, 50; Read v. Robinson, 6 Watts & S. 329; McKinney v. Rhoads, 5 Watts, 343; Ingram v. Kirkpatrick, 6 Ired. Eq. 463; Stimpson v. Fries, 2 Jones Eq. 156; Tennant v. Stoney, 1 Rich. Eq. 222; England v. Reynolds, 38 Ala. 370; Pearson v. Rockhill, 4 B. Mon. 296; Furman v. Fisher, 4 Coldw. 626; but see Gibson v. Rees, 50 Ill. 383. The doctrine which generally prevails, in the absence of statutory regulations, seems to be as follows: A creditor is not bound to accept the provision made in his behalf, nor does the assignment preclude him from suing the debtor and obtaining a judgment upon his claim; but he can not reach the *assigned property* in satisfaction of his judgment unless he is able to procure the assignment to be set aside as fraudulent against creditors. In many of the states, the acceptance by the creditor of the provision made in the assignment in part payment of his demand will not prevent him from subsequently enforcing the balance of the claim against the debtor's after acquired property; since the assignment is purely voluntary, and is not *per se* a composition with creditors, nor does it operate as a discharge in bankruptcy. A clause inserted in the assignment to the effect that a creditor must release and discharge his entire demand as a condition to his claiming any benefits under the trust, is held in many states to render the whole assignment void on the ground that it necessarily hinders and delays creditors; such provisions, however, seem to be sustained as valid and operative by the courts of other states.

[2] *In re* Lewis, 81 N. Y. 421; Nicholson v. Leavitt, 6 Id. 510, 519. In the first case it was held that an assignee could not prefer a particular debt not preferred by the terms of the assignment.

execution of the trust is not within the meaning and scope of the statute which avoids transfers in fraud of creditors.[1]

§ 995. **Deeds of Trust to Secure Debts.**—A special form of trust for the benefit of creditors peculiar to the law of this country, has become quite common in several of the states, and requires a brief description. A "deed of trust to secure a debt" is a conveyance made to a trustee as security for a debt owing to the beneficiary—a creditor of the grantor, and conditioned to be void on payment of the debt by a certain time, but if not paid the trustee to sell the land and apply the proceeds in extinguishing the debt, paying over any surplus to the grantor. The object of such deeds is, by means of the introduction of trustees, as impartial agents of the creditor and debtor, to provide a convenient, cheap, and speedy mode of satisfying debts on default of payment.[2] A distinction, however, should be noted in this connection between unconditional deeds of trust to raise funds for the payment of debts, and deeds of trust in the nature of mortgages, the former being absolute

[1] Hendricks v. Robinson, 2 Johns. Ch. 283; Nicholson v. Leavitt, 6 N. Y. 510; Hauselt v. Vilmar, 76 Id. 630; Halsey v. Whitney, 4 Mason, 206, 227–230; Ogden v. Larrabee, 57 Ill. 389. The validity of the assignment depends upon the question whether it falls within the inhibitions of the statute of 13 Eliz., c. 5, and analogous statutes of the American states. If executed with an actual intent to hinder, delay, or defraud creditors, as shown by extrinsic evidence; or if it contains provisions which necessarily operate to hinder or delay creditors, and therefore raise a conclusive presumption of such an intent, the assignment will be declared void. Various provisions have been thus condemned by the courts, although there is not a perfect uniformity among the decisions. A provision which creates a trust in favor of the debtor himself, to be operative before all the creditors are fully paid, will always render the assignment void. See Stickney v. Crane, 35 Vt. 89; Therasson v. Hickok, 37 Id. 454; McGregor v. Chase, Id. 225; Frink v. Buss, 45 N. H. 325; Fairchild v. Hunt, 1 McCarter, 367; Hyslop v. Clarke, 14 Johns. 458; Austin v. Bell, 20 Id. 442; Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Sheldon v. Dodge, 4 Denio, 217; Lentilhon v. Moffat, 1 Edw. Ch. 451; Grover v. Wakeman, 11 Wend. 187, 201, 203; 4 Paige, 23; Halstead v. Gordon, 34 Barb. 422; Schlussel v. Willett, Id. 615; Barney v. Griffin, 2 N. Y. 365; Leitch v. Hollister, 4 Id. 211; Litchfield v. White, 7 Id. 438; Kellogg v. Slawsen, 11 Id. 302, 304; Nichols v. McEwen, 17 Id. 22; Campbell v. Woodworth, 24 Id. 304; 33 Barb. 425; Dunham v. Waterman, 17 N. Y. 9; Nicholson v. Leavitt, 6 Id. 510; Brigham v. Tillinghast, 13 Id. 215; Rapalee v. Stewart, 27 Id. 310; Ogden v. Peters, 21 Id. 23; Griffin v. Marquardt, Id. 121; Jessup v. Hulse, Id. 168; Wilson v. Robertson, Id. 587; Coyne v. Weaver, 84 Id. 386; McConnell v. Sherwood, 84 Id. 522; Townsend v. Stearns, 32 Id. 209; Benedict v. Huntington, Id. 219; Spaulding v. Strang, 37 Id. 135; 38 Id. 9; Cuyler v. McCartney, 40 Id. 221; Putnam v. Hubbell, 42 Id. 106; and see 1 Am. Lead. Cas. pp. 56–75. An assignment including property of the debtor which has been levied on by execution against him, is valid, and passes the title subject to the lien of the levy. Mumper v. Rushmore, 79 N. Y. 19. An assignment may be made by a debtor of a part of his property in trust to pay some particular creditor or creditors; its validity would depend upon the same question whether it was made with a fraudulent intent. See State v. Benoist, 37 Mo. 500; Robbins v. Fitz, 33 N. Y. 420.

[2] Taylor v. Stearns, 18 Gratt. 244, 278.

and indefeasible conveyances for the purposes of the trust, while the latter are conveyances by way of security, subject to a condition of defeasance.[1] In many states deeds of trust to secure debts are much favored, either on account of the intervention of disinterested third parties, whose position as trustees secures to the debtor fair dealing, or the absence of any necessity for the intervention of the courts; though in some states they are required to be judicially foreclosed, and are therefore of no practical advantage.[2] Indeed, in a majority of the states this form of security has come into general, and, in some instances, universal use. An intimate relation exists between deeds of trust to secure debts and mortgages, especially mortgages containing powers of sale; in fact, the former are generally considered as being in legal effect mortgages.[3] Where a mortgage is regarded as a conveyance of the legal estate, a deed of trust can be no less a conveyance of the legal estate, and where a mortgage is considered as but a mere lien, a deed of trust is generally considered as nothing more than a lien.[4] A reconveyance, as a general rule, is not necessary on payment of the debt secured by a deed of trust, satisfaction being entered in the margin, as in the case of a mortgage.[5] Statutes relating to the recording of mortgages embrace deeds of trust, without

[1] Hoffman v. Mackall, 5 Ohio St. 124, 130; Newman v. Samuels, 17 Iowa, 528; Turner v. Watkins, 31 Ark. 429; Soutter v. Miller, 15 Fla. 625. But see State B'k v. Chapelle, 40 Mich. 447, where a conveyance to a trustee for sale and payment of debts was treated as a mortgage.

[2] *Iowa.*—Code (1880), § 3319; Ingle v. Culbertson, 43 Iowa, 265. *Kansas.* Samuel v. Holladay, 1 Woolw. 400. *Kentucky.*—Campbell v. Johnston, 4 Dana, 178.

[3] Woodruff v. Robb, 19 Ohio, 212; Sargent v. Howe, 21 Ill. 148; Newman v. Samuels, 17 Iowa, 528, 535; Lenox v. Reed, 12 Kan. 223, 227; Webb v. Hoselton, 4 Neb. 308; Wright v. Bundy, 11 Ind. 398, 405, where it was held a railroad might make a deed of trust under an authority to mortgage its property; Bennett v. Union Bank, 5 Humph. 612; a bank authorized to hold land mortgaged to it for security may take a deed of trust. Turner v. Watkins, 31 Ark. 429; Blackwell v. Barnett, 52 Tex. 326. *Contra*, Koch v. Briggs, 14 Cal. 256; Grant v. Burr, 54 Id. 298; Bateman v. Burr, 7 Pac. Coast L. J. 274. See, also, Wilkins v. Wright, 6 McLean, 340; B'k of Commerce v. Lanahan, 45 Md. 396.

[4] *Iowa.*—Newman v. Samuels, 17 Iowa, 528, 535. *Kansas.*—Lenox v. Reed, 12 Kan. 223, 227. *Nebraska.*—Webb v. Hoselton, 4 Neb. 308. *Michigan.*—Flint etc. R'y Co. v. Auditor-Gen., 41 Mich. 635. *Texas.*—Wright v. Henderson, 12 Tex. 43; Walker v. Johnson, 37 Id. 127, 129; McLane v. Paschal, 47 Id. 365; Blackwell v. Barnett, 52 Id. 326. *California.*—A deed of trust is not a mortgage. Koch v. Briggs, 14 Cal. 256; Grant v. Burr, 54 Id. 298; Bateman v. Burr, 7 Pac. Coast L. J. 274. As to the distinction between mortgages and deeds of trust, see Wilkins v. Wright, 6 McLean, 340; B'k of Commerce v. Lanahan, 45 Md. 396.

[5] Ingle v. Culbertson, 43 Iowa, 265; Smith v. Doe, 26 Miss. 291; Crosby v. Huston, 1 Tex. 203. But see Wilkins v. Wright, 6 McLean, 340. An entry of satisfaction by one who fraudulently pretends to be the holder of all the notes described in the deed, does not discharge the property as against an innocent holder for value of a note so secured. Gottschalk v. Neal, 6 Mo. App. 596.

special mention of the latter,[1] as also do those relating to powers of sale contained in mortgages.[2] While a mortgage with power of sale may be assigned, in the absence of words restricting an assignment, and the power of sale passes thereby to the assignee, a deed of trust to secure a debt, being a confidence reposed, can not be delegated, and no assignment is possible, without an express and positive permission in the deed.[3] The duties of the trustee of a deed of trust require the utmost good faith and impartiality as regards both the debtor and creditor. He is personally liable in a suit at law for damages to the party aggrieved for a failure to use reasonable diligence, or an abuse of his discretionary powers;[4] and a sale may be enjoined or set aside at the instance of the injured party.[5] It is not neces-

[1] Woodruff v. Robb, 19 Ohio, 212; Crosby v. Huston, 1 Tex. 203, 239; Magee v. Carpenter, 4 Ala. 469; Wood v. Lake, 62 Ala. 489; Schultze v. Houfes, 96 Ill. 335.

[2] *Alabama.*—Code (1876), §§ 2198, 2877–2889. *California.*—Civil Code, § 2932. But see Koch v. Briggs, 14 Cal. 256; Grant v. Burr, 54 Id. 298; Bateman v. Burr, 7 Pac. Coast L. J. 274. *Dakota.*—Rev. Code (1877), pp. 613–616, 275. *Illinois.*—R. S. (1877), p. 676, and see Bloom v. Van Rensselaer, 15 Ill. 503; Farrar v. Payne, 73 Id. 82. *Indiana.*—Revision (1876), vol. 2, p. 261, and see Rowe v. Beckett, 30 Ind. 154; Martin v. Reed, 30 Id. 218. *Iowa.*—Code (1873), § 3319. See, also, Pope v. Durant, 26 Iowa, 233; Fanning v. Kerr, 7 Id. 450. *Kansas.*—Gen. Stat. (1868), c. 114, § 18; 2 Dassler's Stat. (1876), § 5631. *Kentucky.*—Rev. Stat. (1873) p. 588. See, also, Campbell v. Johnston, 4 Dana, 178; Lyons v. Field, 17 B. Mon. 543, 549; Smith v. Vertrees, 2 Bush, 63; Reid v. Welsh, 11 Id. 450. *Maryland.*—Code (1860), p. 445. *Massachusetts.*—Gen. Stat., c. 140, §§ 38–44; Stat. 1868, c. 197. *Michigan.*—Compiled Laws (1871), pp. 1921–1925. *Minnesota.*—Revision (1866), pp. 562–565; Stat. at Large (1873), pp. 900–907. *Mississippi.*—Laws (1876), p. 37. *Missouri.*—Wagner's Stat. (1870), p. 954, § 2; Id., pp. 94, 956, 1347. See, also, Lass v. Sternberg, 50 Mo. 124; McKnight v. Wimer, 38 Mo. 132; Tatum v. Holliday, 59 Mo. 422. *Nevada.*—Comp. Laws (1873), §§ 1292–1295, 1309–1311. *New York.*—Fay's Dig. of Laws (1876), vol. 2, pp. 65–67; and see Elliott v. Wood, 45 N. Y. 71; S. C., 53 Barb. 285; Sherwood v. Reade, 7 Hill, 431, reversing S. C., 8 Paige, 633; Hubbell v. Sibley, 5 Lans. 51; Cohoes Co. v. Goss, 13 Barb. 137; Lawrence v. Farmers' etc. Co., 13 N. Y. 200. *Rhode Island.*—Gen. Stat. c. 165, § 15. *Tennessee.*—Code (1858), §§ 2124–2127; and see Caldwell v. Bowen, 4 Sneed, 415. *Virginia.*—Code (1873), c. 113, §§ 5, 6. This state has legislated to some extent on deeds of trust, as also *West Virginia.*—Code (1870), c. 72, §§ 5–10; and amendments (1870), c. 51. *Wisconsin.*—Rev. Stat. (1871), vol. 2, pp. 1777–1782.

[3] Whittelsey v. Hughes, 39 Mo. 13; McKnight v. Wimer, 38 Id. 132; and see Pickett v. Jones, 63 Id. 195, 199.

[4] Sherwood v. Saxton, 63 Mo. 78; State v. Griffith, 63 Id. 545; Ballinger v. Bourland, 87 Ill. 513; the remedy is at law and not in equity for a failure to pay over to the proper party the excess of the proceeds over and above the debt and reasonable expenses.

[5] Terry v. Fitzgerald, 32 Gratt. 843; Meyer v. Jefferson Ins. Co., 5 Mo. App. 245; Eitelgeorge v. Mutual etc. Assoc., 69 Mo. 52; Cassidy v. Cook, 99 Ill. 385, 389: "A trustee's duties are not merely formal. It is his duty, in the faithful discharge of his trust, to inform himself as to the condition of the property which he is about to sell, and to adopt that course which, in his judgment, will bring the highest price." But the fact that the property was bought on behalf of the creditor, or that the price bid was low, does not necessarily invalidate the sale. Landrum v. Union B'k, 63 Mo. 48. But a sale will not be set aside as

sary that the person who is to execute the power in a trust deed should join in the deed, or execute any formal writing showing his acceptance of the trust;[1] nor is it necessary that the beneficiary should signify his assent by any formal writing, for his assent is presumed since the deed is for his benefit.[2] Where a trustee has accepted the trust, he can not renounce it without the consent of the beneficiary, or of a court of equity;[3] and he may be compelled to discharge the trust.[4]

§ 996. **Voluntary Trusts.**—The particular question to be examined under this head, and which renders it one of such great practical importance, is, when will trusts and transactions in the nature of trusts which are purely voluntary, virtual gifts, be treated as binding and enforceable in equity. The answer, it will be seen, turns upon the distinction between trusts which are executed—that is, completely created or declared—and those which are merely executory, incomplete—that is, promises to create a trust. The full discussion of the subject also involves the difference between assignments perfect and imperfect, and declarations of trust. Underlying the whole theory of voluntary trusts is the principle that, while the maxim *ex nudo pacto non oritur actio* operates in equity even more strictly than at the common law, so that a promise without any valuable consideration has no binding efficacy, still a valid trust may be created without any valuable consideration; if a trust has been completely declared, the absence of a valuable consideration is entirely immaterial.[5] Another principle frequently applicable in cases of this kind is, that equity generally regards an imperfect conveyance or assignment as a contract to convey or assign; but whether such contract is binding or not must depend upon the circumstances.[6]

§ 997. **The General Doctrine: Incomplete Voluntary Trusts not Enforceable.**—The general doctrine is well settled.

against innocent remote purchasers without notice, for such irregularities as over-statement of the amount of indebtedness, or a sale, if *bona fide*, of lots *en masse*. Fairman v. Peck, 87 Ill. 156; Farrar v. Payne, 73 Id. 82. And if the face of the deed does not show that it was made contrary to the terms of the deed of trust, a subsequent grantee, without actual notice of any defects in the sale, will acquire such title as will not be set aside. Gunnell v. Cockerill, 84 Ill. 319; Watson v. Sherman, 84 Ill. 263. But only a party to or person interested in a trust deed can complain of irregularities in the execution of the trust. Wade v. Thompson, 52 Miss. 367.

[1] Leffler v. Armstrong, 4 Iowa, 482; Crocker v. Lowenthal, 83 Ill. 579.

[2] Wiswall v. Ross, 4 Port. 321; Shearer v. Loftin, 26 Ala. 703.

[3] Drane v. Gunter, 19 Ala. 731.

[4] Sargent v. Howe, 21 Ill. 148.

[5] Ellison v. Ellison, 6 Ves. 656; Pulvertoft v. Pulvertoft, 18 Id. 84; *Ex parte* Pye, Id. 140; Kekewich v. Manning, 1 De G. M. & G. 176, 190; Dickinson v. Burrell, L. R., 1 Eq. 337, 343.

[6] Parker v. Taswell, 2 De G. & J. 559.

A perfect or completed trust is valid and enforceable, although purely voluntary. A voluntary trust which is still executory, incomplete, imperfect, or promissory, will neither be enforced nor aided.[1] In order to render the voluntary trust valid and

[1]It seems appropriate, in order to illustrate this general doctrine, of which all the decided cases are mere applications, to quote the language of a few leading and modern cases in which the subject was fully examined and the conclusions accurately stated. In Milroy v. Lord, 4 De G. F. & J. 264, 274, Turner, L. J., thus formulated the doctrine, and his statement has been approved by nearly every subsequent decision: "I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of these modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which the case must be tried." Richards v. Delbridge, L. R., 18 Eq. 11, 13, Sir George Jessel, M. R., said: "The principle is a very simple one. A man may transfer his property without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property, takes it beneficially or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title, may so deal with the property, as to deprive himself of its legal ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, 'I give or grant certain property to A. B.' [He cites Morgan v. Malleson, L. R., 10 Eq. 475, and Richardson v. Richardson, Id., 3 Eq. 686.] The true distinction appears to me to be plain, and beyond dispute; for a man to make himself a trustee there must be an expression of *intention to become a trustee*, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise. [He then quotes and approves the language cited above from Milroy v. Lord.] If the decisions in Morgan v. Malleson and Richardson v. Richardson were right, there never could be a case where an expression of present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are

effectual, the party creating it either by direct transfer or by declaration, must have done everything which, according to the nature of the property comprised in it, was necessary to be done in order to transfer the property and render the transaction

held to be evidence of a contract which the court will enforce." The case of Kekewich v. Manning, 1 De G. M. & G. 176, is also a most important one, and contains an examination of nearly all the previous authorities. See also Warriner v. Rogers, L. R., 16 Eq. 340; Heartley v. Nicholson, Id., 19 Eq. 233; Jones v. Lock, Id., 1 Ch. 25. The decisions of Page Wood, V. C. in Richardson v. Richardson, Id., 3 Eq. 686, and of Lord Romilly, M. R., in Morgan v. Malleson, Id., 10 Eq. 475, have been greatly shaken, even if not entirely overruled by the subsequent cases cited above in the 16th, 18th, and 19th volumes of Equity Cases; but they are approved in the still more recent case of Baddeley v. Baddeley, L. R., 9 Ch. D. 113.

In the recent case of Young v. Young, 80 N. Y. 422, 436, the subject was examined in an exhaustive manner by Rapallo, J. I quote his very instructive opinion: "The only question remaining is, whether a valid declaration of trust is made out. The difficulty in establishing such a trust is that the donor did not undertake or attempt to create it, but to vest the property directly in the donees. He simply signed a paper, certifying that the bonds belonged to his sons. He did not declare that he held them in trust for the donees, but that they owned them, subject to the reservation, and were at his death to have them absolutely. If this instrument had been founded upon a valuable consideration, equity might have interfered and effectuated its intent by compelling the execution of a declaration of trust, or by charging the bonds while in his hands, with a trust in favor of the equitable owner (Day v. Roth, 18 N. Y. 448). But it is well settled that equity will not interpose to perfect a defective gift, or voluntary settlement made without consideration. If legally made it will be upheld, but it must stand as made or not at all. Where, therefore, it is found that the gift which the deceased attempted to make failed to take effect for want of delivery, or of a sufficient transfer, and it is sought to supply this defect, and carry out the intent of the donor by declaring a trust which he did not himself declare, we are encountered by the rule above referred to (citing many cases). It is established as unquestionable law that a court of equity can not, by its authority, render that gift perfect which the donor has left imperfect, and can not convert an imperfect gift into a declaration of trust, merely on account of that imperfection. (Heartley v. Nicholson, L. R., 19 Eq. 233.) It has, in some cases, been attempted to establish an exception in favor of a wife and children, on the ground that the moral obligation of the donor to provide for them, constituted what was called a meritorious consideration for the gift; but Judge Story says the doctrine seems now to be overthrown (Eq. Jur., §§ 433, 987), and that the general principle is established that in no case whatever will courts of equity interfere in favor of mere volunteers, whether it be upon a voluntary contract, or a covenant, or a settlement, however meritorious may be the consideration, and although the beneficiaries stand in the relation of a wife or child (Holloway v. Headington, 8 Sim. 324; Jefferys v. Jefferys, 1 Cr. & Ph. 138, 141). These positions are sustained by many authorities. To create a trust the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another (Martin v. Funk, 75 N. Y. 134). Though it is not necessary that the declaration of trust be in terms explicit, the donor must have evinced, by acts which admit of no other interposition, that such legal right as he retains, is held by him as trustee for the donee. (Heartley v. Nicholson, L. R., 19 Eq. 233; Richards v. Delbridge, Id., 18 Eq. 11.) The settlor must transfer the property to a trustee, or declare that he holds it himself in trust (Milroy v. Lord, 4 De G. F. & J. 264). In cases of voluntary settlements or gifts, the court will not impute a trust where a trust was not in fact the thing contemplated. * * * The words of the donor in the present case are that the bonds are owned by the donees, but that the interest to ac-

binding upon him. A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of three modes: (1) He may make a simple conveyance or assignment

crue thereon is owned and reserved by the donor for so long as he shall live, and at his death they belong absolutely to the donees. No intention is here expressed to hold any legal title to the bonds in trust for the donees. Whatever interest was intended to be vested in them, was transferred to them directly, subject to the reservation in favor of the donor during his life, and free from that reservation at his death. Nothing was reserved to the donor, to be held in trust or otherwise, except his right to the accruing interest which should become payable during his life. It could only be by reforming or supplementing the language used, that a trust could be created, and this will not be done in case of a voluntary settlement without consideration. [Mr. Justice Rapallo then reviews the two cases of Richardson v. Richardson, and Morgan v. Malleson, *supra*, and declares that they have been overruled.] In Moore v. Moore, 43 L. J. Ch. (N. S.) 623, Hall, V. C., says: 'I think it very important indeed to keep a clear and definite distinction between these cases of imperfect gifts, and cases of declarations of trust; and that we should not extend beyond what the authorities have already established, the doctrine of declarations of trust, so as to supplement what would otherwise be mere imperfect gifts.' If the settlement is intended to be effectuated by gift, the court will not give it effect by construing it as a trust. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. The case of Martin v. Funk, and kindred cases, can not aid the respondent. In all those cases there was an express declaration of trust. In the one named the donor delivered the money to the bank, taking back its obligation to herself *in the character of trustee* for the donee; thus parting with all beneficial interest in the fund, and having the legal title vested in her in the character of trustee only. No interposition on the part of the court was necessary to confer that character upon her; nor was it necessary by construction or otherwise to change or supplement the actual transaction." In Martin v. Funk, 75 N. Y. 134, 137, Church, C. J., thus sums up the doctrine: "It is clear that a person *sui juris* acting freely and with full knowledge has the power to make a voluntary gift of the whole or any part of his property, while it is well settled that a mere intention, whether expressed or not, is not sufficient, and a voluntary promise to make a gift is *nudum pactum*, and of no binding force. The act constituting the transfer must be consummated, and not remain incomplete or rest in mere intention; and this is the rule whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee. Enough must be done to pass the title, although when a trust is declared, whether in a third person or in the donor, it is not essential that the property should be actually possessed by the *cestui que trust*, nor is it even essential that the latter should even be informed of the trust." In Estate of Webb, 49 Cal. 541, 545, Crockett, J., said: "In such cases the point to be determined is, whether the trust has been perfectly created—that is to say, whether the title has passed and the trust been declared—and the trust being executed, nothing remains for the court but to enforce it. In discussing this question, the court say in Stone v. Hackett, 12 Gray, 227: 'It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding, so long as it remains executory. But it is equally true, that if such a contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery.' * * * This was not an executed trust, but

of it directly to the donee, so as to vest in the latter whatever interest and title the donor has without the intervention of any trust. (2) He may make a transfer of it to a third person upon trusts declared in favor of the donee. (3) He may retain the title, and declare himself a trustee for the donee, and thus clothe the donee with the beneficial estate. In either of these modes, if the transaction is imperfect and executory, equity will not aid nor enforce it; and if the intention of the party is to adopt one of the methods, a court of equity will not resort to either of the other methods for the purpose of carrying it into

at most nothing more than a voluntary, executory agreement to create a trust *in futuro*, and such agreements can not be enforced in equity." In Bond v. Bunting, 78 Pa. St. 210, an opinion by Hare, J., contains a valuable discussion of the doctrine, but his conclusions are somewhat broader than seems to be sustained by the course of recent authority. Ellison v. Ellison, 6 Ves. 656; 1 Eq. Lead. Cas. 382, 389, 415 (4th Am. ed.); Pulvertoft v. Pulvertoft, 18 Ves. 84; *Ex parte* Pye, Id. 140; Antrobus v. Smith, 12 Id. 39; Edwards v. Jones, 1 My. & Cr. 226; Fortescue v. Barnett, 3 My. & K. 36; Colman v. Sarrel, 3 Bro. Ch. 12; 1 Ves. 50; Blakely v. Brady, 2 Dr. & Wal. 311; Wheatley v. Purr, 1 Keen, 551; Colyear v. Lady Mulgrave, 2 Id. 81; Godsal v. Webb, Id. 99; Holloway v. Headington, 8 Sim. 324; Beatson v. Beatson, 12 Id. 281, 294; Searle v. Law, 15 Id. 95; Dillon v. Coppin, 4 My. & Cr. 647; Jefferys v. Jefferys, 1 Cr. & Ph. 138; Bayley v. Boulcott, 4 Russ. 345; Farquharson v. Cave, 1 Coll. 356; Meek v. Kettlewell, 1 Hare, 464; 1 Phil. 342; Paterson v. Murphy, 11 Hare, 88; Ward v. Audland, 8 Beav. 201; James v. Bydder, 4 Id. 600; Dening v. Ware, 22 Id. 184; Bridge v. Bridge, 16 Id. 315, 327; Beech v. Keep, 18 Id. 285; Donaldson v. Donaldson, Kay, 711; Voyle v. Hughes, 2 Sm. & Giff. 18; Airey v. Hall, 3 Id. 315; Parnell v. Hingston, Id. 337; *In re* Patterson's Estate, 4 De G. J. & S. 422; *In re* Way's Trust, 2 Id. 365; Dillwyn v. Llewelyn, 4 De G. F. & J. 517; Crouch v. Waller, 4 De G. & J. 302; Scales v. Maude, 6 De G. M. & G. 43; Lister v. Hodgson, L. R., 4 Eq. 30; Baddeley v. Baddeley, Id., 9 Ch. D. 113; Neves v. Scott, 9 How. (U. S.) 196; Adams v. Adams, 21 Wall. 185; Blanchard v. Sheldon, 43 Vt. 512; Davis v. Ney, 125 Mass. 590; Hunt v. Hunt, 119 Id. 474; Clark v. Clark, 108 Id. 522; Brabrook v. Five Cent Sav. B'k, 104 Id. 228; Wason v. Colburn, 99 Id. 342; Sherwood v. Andrews, 2 Allen, 79, 81; Stone v. Hackett, 12 Gray, 227; Ray v. Simmons, 11 R. I. 266; Taylor v. Staples, 8 Id. 170, 176; Stone v. King, 7 Id. 358; Minor v. Rogers, 40 Conn. 512; Trow v. Shannon, 78 N. Y. 446; Curry v. Powers, 70 Id. 212, 219; Wright v. Miller, 8 Id. 9; Hunter v. Hunter, 19 Barb. 631; Gilchrist v. Stevenson, 9 Id. 9; Acker v. Phœnix, 4 Paige, 305; Hayes v. Kershow, 1 Sandf. Ch. 258, 261; Bunn v. Winthrop, 1 Johns. Ch. 329, 337; Souverbye v. Arden, Id. 240; Minturn v. Seymour, 4 Id. 497; Ownes v. Ownes, 23 N. J. Eq. 60, 62; Vreeland v. Van Horn, 17 Id. 137, 139; Carhart's Appeal, 78 Pa. St. 100, 119; Trough's Estate, 75 Id. 115; Zimmerman v. Streeper, 75 Id. 147; Dellinger's Appeal, 71 Id. 425; Crawford's Appeal, 61 Id. 52; Pringle v. Pringle, 59 Id. 281; Ritter's Appeal, Id. 9; Cressman's Appeal, 42 Id. 147; Lonsdale's Estate, 29 Id. 407; Dennison v. Goehring, 7 Barr, 175, 178; Jones v. Obenchain, 10 Gratt. 259; Dunbar v. Woodcock, 10 Leigh, 628; Reed v. Vannorsdale, 2 Id. 569; Taylor v. Henry, 48 Md. 550; Cox v. Hill, 6 Id. 274; McNulty v. Cooper, 3 Gill. & J. 214; Tolar v. Tolar, 1 Dev. Eq. 460; Dawson v. Dawson, Id. 93, 400; Andrews v. Hobson, 23 Ala. 219; Pinckard v. Pinckard, Id. 649; Crompton v. Vesser, 19 Id. 259; Evans v. Battle, Id. 398; Lane v. Ewing, 31 Mo. 75; Henderson v. Henderson, 21 Id. 379; Otis v. Beckwith, 49 Ill. 121, 128; Olney v. Howe, 89 Id. 556; Clarke v. Lott, 11 Id. 105; Huston v. Markley, 49 Iowa, 162; Wyble v. McPheters, 52 Ind. 393.

effect. Whenever the party intends to make a transfer directly to the donee, he must do all that is necessary, according to the nature of the property, to pass and vest the title, by valid conveyance in case of real property, and by valid assignment in case of personal property, and generally accompanied by an actual delivery of chattels and things in action where the donor is the legal owner. Where the donor shows an intention to adopt this first method, and thus to vest the property directly in the donee, and the act of donation is simply an assignment of any form, *but is imperfect* so that it does not pass the title, a court of equity will not treat it as a declaration of trust constituting the donor himself a trustee for the donee; an imperfect voluntary assignment will not be regarded in equity as an agreement to assign for the purpose of raising a trust. If the donor adopts the second or third mode, he need not use any technical words, or language in express terms creating or declaring a trust, but he must employ language which shows unequivocally an intention on his part to create a trust in a third person or to declare a trust in himself. It is not essential, however, that the donor should part with the possession in the cases where he thus creates or declares a trust. These conclusions are sustained by the decided weight of authority, and must be regarded as the settled rules of equity jurisprudence upon the subject. The general doctrine which has been thus explained may find its application under two different conditions of fact: (1) Where the donor is the absolute owner of the property, holding the legal and equitable title thereof. (2) Where the donor is only the equitable owner, holding only the equitable estate, the legal title being vested in some third person as his trustee. These two conditions will be examined separately.

§ 998. **Donor the Legal Owner.**—The foregoing general conclusions determine all particular questions which can arise under this condition of fact. If the donor makes a complete conveyance of real property or assignment of personal property sufficient to vest the legal title in the donee; or if he completely conveys or assigns the property to a trustee upon trusts effectually created on behalf of the donee; or if he retains the legal title but effectually declares himself a trustee for the donee, thus clothing the donee with all of the beneficial estate; then in each of these instances the gift is valid although voluntary; the donee's rights are perfect, and equity will enforce them against the donor, and all persons claiming under him as vol-

unteers.[1] Where the donor has the legal title, and the property is of such a nature that a legal estate can be transferred—that is, is land, chattels, money, and some species of things in action, an imperfect conveyance or assignment, which does

[1] The practical question always is, whether the conveyance or assignment *is* sufficient to pass the legal title; or whether a trust *has been* effectually created or declared, while no particular express words are necessary either to create a trust in third persons, or to declare the donor a trustee, some words unequivocally showing such intent are indispensable. A mere imperfect assignment, without words indicating an intent to create a trust or to declare the donor a trustee, can not be construed as a declaration of trust, so as to raise a trust in the donee's favor, which equity may enforce. Where the subject-matter is personal property, a parol declaration of trust, if otherwise sufficient, is effectual. See the cases cited in the last note, and especially the quotations. I add the facts of a few instructive cases by way of illustration.

In Mitchell v. Smith, *in re* Patterson's Estate, 4 De G. J. & S. 422, A., the payee of certain promissory notes, brought them to his nephew, B., and said, "I give you these notes," and added that B. should have them at A.'s death, but the latter would like to be master of them as long as he lived. A. then indorsed the notes as follows: "I bequeath—pay the within contents to B., or his order, at my death." A. retained possession of the notes until his death a few months afterwards. Held, that B. had obtained no rights whatever in the notes. This case is a good illustration of an attempted assignment which fails to pass the legal title. In Milroy v. Lord, 4 De G. F. & J. 264, A. owned fifty shares of stock of a bank, which stood upon the books of the bank in his name. By the charter of the bank its shares were transferable only by entry made in the transfer books of the corporation. A. executed a voluntary deed, by which he purported to assign these shares to B., in trust for the plaintiff C., but no transfer was made upon the bank's books. Held, that as the assignment was incomplete and inoperative to pass the legal title to the trustee, B., no trust was effectually created in C.'s favor; and also since the plain intention was to vest the trust in B., and not to constitute the donor a trustee, the assignment could not be construed as a declaration of trust binding the shares in the donor's hands. In Scales v. Maude, 6 De G. M. & G. 43, a mortgagee had written various letters to the mortgagor, about the mortgage, in which he said: "I now give this gift to become due, at my death, unconnected with my will;" "I hereby request my executors to cancel the mortgage deed;" "I again direct and promise that my executors shall comply with my former request, that is, to cancel all deeds and papers I may have chargeable on the R. estate," etc. Held, that these expressions did not constitute a valid gift nor operate as a declaration of trust. In his opinion Lord Cranworth said: "Mere declaration of trust by the owner of property, in favor of a volunteer, is inoperative, and this court will not interfere in such a case." This broad *dictum* is clearly erroneous, for a mere declaration of trust by the owner, in favor of a volunteer, if effectually made, is operative. In the subsequent case of Jones v. Lock, Lord Cranworth frankly admitted his mistake. In Jones v. Lock, L. R., 1 Ch. 25, 28, a father put a check into the hand of his infant son, and said, "I give this to baby for himself," and then took it back and put it away. He also expressed the intention of giving the amount of it to his son. Shortly afterwards the father died, and the check was found among his papers. Held, that there was no valid gift, and no declaration of trust constituting the donor a trustee. Lord Cranworth said that the owner of property may, by a declaration of trust, constitute himself a trustee on behalf of a volunteer; and that a parol declaration of trust of personalty may be valid in such a case. When there has been a declaration of trust it will be enforced even in favor of volunteers; but an imperfect gift can not be enforced. In Richardson v. Richardson, L. R., 3 Eq. 686, E., by a voluntary deed, assigned certain specific

not pass the legal title, will not be aided or enforced in equity. But if the property is not of such a nature that the legal title can be transferred, then, if nothing more remains to be done or can be done by the grantor or donor—if, as far as he is con-

property, and "all other the personal estate, whatsoever and wheresoever," of the assignor to R. absolutely. At the date of the assignment, E. was owner of certain promissory notes. These were not mentioned in the assignment. On R.'s death these notes were found in his possession, *but not indorsed by E.*, and there was no evidence of any delivery of the notes by E. to R. V. C. Page Wood, held, that although the assignment did not operate *as such* to pass the legal title to the notes, still it operated as a declaration of trust by E. in R.'s favor, and R. thereby became entitled to the notes. In Morgan v. Malleson, L. R., 10 Eq. 475, S., the owner of a certain India bond, signed the following voluntary instrument and delivered it to M., but did not deliver the bond itself: "I hereby give and make over to M. an India bond, value £1000." On the death of S., a contest arose between M. and the executors of S., and Lord Romilly held that the assignment was operative as an effectual declaration of trust in M.'s favor, and he was entitled to the bond. The judge said that the assignment was equivalent to the words, "I undertake to hold the bond for you." These two cases have been severely criticised both in England and in this country; they must be regarded as contrary to the doctrine settled by the weight of authority, and as virtually overruled. In Warriner v. Rogers, L. R., 16 Eq. 340, a wealthy lady gave her servant, the plaintiff, a box, which she locked and handed to him, saying that it would be of service to him, but that it must not be opened until after her death, and she retained the key. At her death the box was opened, and in it was found a writing signed by the lady, addressed to the plaintiff, stating that the contents of the box were a deed of gift of certain real and personal estate specified. The box also contained certain title deeds of real property, but no deed to the plaintiff and no instrument of any sort purporting to assign property to him further than the first mentioned writing. There was also another paper left by the deceased, to the effect that the deeds were to be given to the plaintiff: *Held*, that all these writings did not constitute a valid declaration of trust in plaintiff's favor. Bacon, V. C., in his opinion strongly dissented from the two last mentioned cases. In Richards v. Delbridge, L. R., 18 Eq. 11, D., who owned leasehold premises and a stock in trade, purported to make a voluntary transfer or gift of the whole to his grandson E., by means of the following memorandum which he wrote upon the lease and signed: "This deed, and all thereto belonging, I give to E. from this time forth, with all the stock in trade." The lease with the memorandum was then delivered to E.'s mother, and the donor soon afterwards died: *Held*, that there was no valid assignment so as to constitute a perfected gift, and that there was no valid declaration of trust. See the extract from the opinion of Jessel, M. R., quoted in the preceding note. In Heartley v. Nicholson, L. R., 19 Eq. 233, the owner of a share in a coal mine, in letters and by a brief written memorandum indicated his intention to give the share to the plaintiff his daughter; and some of the writings spoke of the share as already given. Nothing was done, however, sufficient to transfer the legal title to the share: *Held*, that these expressions of gift, or of an intention to give, did not amount to a declaration of trust, and did not constitute the father a trustee of the share for his daughter. Notwithstanding these criticisms, the supreme court of Pennsylvania, in Bond v. Bunting, 78 Pa. St. 210, seem to have accepted and followed the decisions in Richardson v. Richardson and Morgan v. Malleson, as correct.

In Martin v. Funk, 75 N. Y. 134, Mrs. Susan B. deposited in a savings bank a sum of money belonging to her, declaring at the time that she wanted the account to be in trust for the plaintiff. The account was so entered in the books of the bank, and a pass-book was delivered to her containing the following: "The Citizens' Savings Bank in account with Susan Boone in trust for Lillie Willard, five hundred hundred dollars." Mrs. B. retained

cerned, the conveyance or assignment is complete, and he has done all that is necessary to be done, having regard to the nature of the property—the conveyance or assignment will be effectual in equity, and will be enforced on behalf of the donee.[1] It should be observed, however, that by recent statutes nearly all, if not quite all, legal things in action have been rendered assignable at law, so that the cases in which the last-mentioned rule can apply have been very much limited.

§ 999. **Donor the Equitable Owner.**—Where the donor is only the equitable owner, the legal estate being vested in a third person, he may make a voluntary transfer of his interest by conveyance or assignment; and if he has done all that is within his power to pass the property directly to the donee, or to declare a trust in favor of the donee, the donee's rights will be protected

possession of the pass-book, and the money remained in the bank until her death. Plaintiff was ignorant of the deposit until after the donor's death: *Held*, that the transaction was an effectual declaration of trust, constituting the donor a trustee for the plaintiff, and clothing the plaintiff with the beneficial ownership of the money; that the donor's retention of the pass-book was not inconsistent with her position as a trustee, and that notice to the *cestui que trust* was not necessary in order to constitute a valid trust. See extract from the able opinion of C. J. Church in the preceding note. In Minor v. Rogers, 40 Conn. 512, and Ray v. Simmons, 11 R. I. 266, the facts were quite similar, and the trusts were upheld. In Young v. Young, 80 N. Y. 422, Young placed certain bonds in two envelopes, and wrote on each envelope a memorandum signed by him, that a specified number of the bonds therein belonged to his son W., and the residue to his son J., but that the interest to become due thereon was "owned and reserved" by himself during his life, and that at his death "they belong absolutely and entirely to W. and J., and their heirs." The donor showed these envelopes and memoranda to the wives of his sons, and made statements to them expressing his intention that the gift was to be complete and valid. The donor retained possession of the envelopes and contents until his death, about a year afterwards: *Held*, that there was no executed and valid gift passing the legal title, and no valid declaration of trust constituting the father a trustee for the donees. See opinion of Rapallo, J., quoted in previous note. In Estate of Webb, 49 Cal. 541, a person had written a letter to his sister, in which he promised to assign some securities to her, and this was held not an executed gift nor a valid trust. In Taylor v. Henry, 48 Md. 550, one H. deposited in a bank a sum of money belonging to himself, to the credit of himself and his sister M., so that the account was entered. "H. M. and the survivor of them, subject to the order of either, received $1850." A short time after, H. drew out fifty dollars, and died in about a month, leaving the eighteen hundred dollars on deposit: *Held*, that since H. retained the power and dominion over the money, there was not a complete gift, and the transaction did not constitute a valid declaration of trust in M.'s favor. See also Boykin v. Pace's Ex'r, 64 Ala. 68; Hill v. Den, 54 Cal. 6; Gadsden v. Whaley, 14 S. C. 210.

[1] Illustrations of the first class, where the assignment was incomplete, and the donee acquired no right: Antrobus v. Smith, 12 Ves. 39; Searle v. Law, 15 Sim. 95. Examples of the second class, where the donor did all that the nature of the property admitted: Edwards v. Jones, 1 My. & Cr. 226, 238; Fortescue v. Barnett, 3 My. & K. 36; Pearson v. Amicable Ass. Co., 27 Beav. 229; Weale v. Ollive, 17 Id. 252; Pedder v. Mosely, 31 Id. 159; Woodford v. Charnley, 28 Id. 96; Blakely v. Brady, 2 Dr. & Wal. 311; Kiddill v. Farnell, 3 Sm. & Giff. 428.

and enforced by a court of equity.[1] Also the donor holding the equitable estate may direct the trustee in whom is vested the legal title, to hold the property in trust for the donee; and this will create a valid trust in favor of the donee, and will clothe him with the beneficial interest, even though the direction is voluntary; and it is not necessary that the trustee should give his assent.[2] Finally, the holder of the equitable estate may, by a sufficient declaration of trust, constitute himself a trustee for the donee with respect to the property, subject to the same limitations which apply to such declarations of trust by a donor who holds the legal estate. In conclusion it may be truly said that each case of voluntary trust or transfer depends largely upon an interpretation of the language used by the donor; whether the language operates as a complete transfer, or is an effectual declaration of trust, must always be the vital question.

§ 1000. **Executed and Executory Trusts.**—This distinction between "executory" and "executed" trusts is solely concerned with questions of construction and interpretation of the instrument creating the trust, and of enforcement of the trust thus created—namely, whether the strict rules of law governing limitations, and especially the rule in Shelley's case, are or are not to be applied in such construction, interpretation, and enforcement. Wherever a trust is executed, it is always construed in conformity with the strict legal rules concerning limitations of estates, and the rule in Shelley's case is made operative if the terms of the successive trusts bring it within that rule, even though the apparent intention of the one creating the trust is thereby defeated. Wherever a trust is executory, the intention of the party is followed in its construction and enforcement, the strict legal rules concerning limitations

[1] Kekewich v. Manning, 1 De G. M. & G. 176; *In re* Way's Trusts, 2 De G. J. & S. 365; Baddeley v. Baddeley, L. R., 9 Ch. D. 113; Gilbert v. Overton, 2 H. & M. 110; Donaldson v. Donaldson, Kay, 711; Voyle v. Hughes, 2 Sm. & Giff. 18; Pearson v. Amicable Ass. Co., 27 Beav. 229; and see Bridge v. Bridge, 16 Beav. 315; Beech v. Keep, 18 Id. 285. Notice to the trustee is not necessary to perfect the trust, Donaldson v. Donaldson, *supra;* Tierney v. Wood, 19 Beav. 330; but may be necessary to protect the donee against third persons. Donaldson v. Donaldson, Kay, 711, 719.

[2] McFadden v. Jenkyns, 1 Phil. 153; Meek v. Kettlewell, 1 Id. 342; Bill v. Cureton, 2 My. & K. 503; Rycroft v. Christy, 3 Beav. 238; Bentley v. Mackay, 15 Id. 12; Gilbert v. Overton, 2 H. & M. 110. A receipt in the form, "Received of B. for the use of A. £100, to be paid to A. at B.'s death," is a sufficient declaration of trust, Moore v. Darton, 4 De G. & Sm. 517; Grant v. Grant, 34 Beav. 623, 626; Paterson v. Murphy, 11 Hare, 88; a banker who debits himself in his books with money on behalf of another person, thereby declares himself a trustee of it, Stapleton v. Stapleton, 14 Sim. 186; and a declaration of trust otherwise sufficient will be valid, although the donor retain possession and control of the fund, Wheatley v. Purr, 1 Keen, 551; Vandenberg v. Palmer, 4 K. & J. 204.

are not invoked, and the rule in Shelley's case is not permitted to operate. Executory trusts and questions concerning them ordinarily arise from marriage articles or inchoate marriage agreements in which a complete settlement is not made, but the party covenants that he will settle property or convey property upon trusts for the benefit of his family, and from wills in which the testator does not devise property upon completed trusts, but devises to trustees upon trusts for them to settle it. In these and similar instances a court of equity is called upon to determine the nature of the settlements to be made, and in doing so it carries out the intention of the covenantor or testator, actual or presumed, without regard to the strict legal rules of limitation. As such instruments are comparatively infrequent in this country, and the subject rarely comes before the American courts, it will be sufficient to state the more general doctrines as established by decisions, without going into any minute detail of special rules.[1]

§ 1001. **Definition and Description.**—A trust is *executed* when no act is necessary to be done to give effect to it, when the trust is fully and finally declared in the instrument creating it. A conveyance of land to A. in trust for B., a devise of land to A. in trust to receive the rents and profits and apply them to the use of B., are examples. It is plain that all ordinary express passive or active trusts are thus executed. A trust is *executory* when some further act is directed to be done in order to complete and perfect the trust intended to be created. A misconception should here be guarded against. When by the terms of the trust *as created*, and for the purpose of carrying it into effect, the trustee is directed to do some act with the property, the trust is not thereby executory. Giving property to a trustee upon trust to convey to a person, or upon trust to convey it upon *certain specified trusts*, does render the trust executory. In all express active trusts the trustee is directed to do some acts with the property. The essence of an executory trust does not consist in acts directed to be done by the trustee with respect to the property, but in acts directed to be done in perfecting and completing the trust itself which was not fully declared in the original instrument of creation. "If the scheme has been imperfectly declared at the outset, and the creator of the trust has merely

[1] The doctrine of executory trusts is one of great practical importance in England. It is fully discussed in Lord Glenorchy v. Bosville, Cas. temp. Talb. 3; 1 Eq. Lead. Cas. 1, 13, 36, and the editors' notes (4th Am. ed.)

denoted his ultimate object, imposing on the trustee or on the court the duty of effectuating it in the most convenient way, the trust is called executory."[1] "All trusts are in a sense executory, because a trust can not be executed except by conveyance, and therefore there is something always to be done. But that is not the sense which a court of equity puts upon the term *executory trust*. A court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner: Has the testator [or settlor] been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from *general expressions* what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given you, and to convert them into legal estates?"[2] In a word, the

[1] This very accurate statement is quoted from the text of Adams on Equity, p. 127 (p. 40, m. p.)

[2] Egerton v. Brownlow, 4 H. L. Cas. 1, 210 *per* Lord St. Leonards. The whole subject was very fully and ably discussed in the recent case of Cushing v. Blake, 30 N. J. Eq. 689, and as such discussions are comparatively rare in our reports, it may be proper to quote from the case at some length. William Durbridge, contemplating marriage, conveyed certain lands to Blake, for the benefit of his intended wife, a daughter of Blake. Mr. Blake executed a deed, reciting the intended marriage, the conveyance of the property to himself in trust for the future wife's sole use and benefit, etc., and declaring that he held the premises only in trust for the sole and separate use of the intended wife. The deed went on to declare specific trusts in favor of the wife, that she should have possession, should receive the rents and profits, etc., and added, "on the further trust that he would, whenever required by her in writing during her life-time, convey the property to such person as she should appoint, and at her death to such person as she should by her will have appointed, and on failure of such will to her heirs at law, to hold to them their heirs and assigns forever." The marriage took place; the wife died, leaving one child, and without having disposed of any part of the property during her lifetime, and without making a will. Her husband survived her, and after her death conveyed his life estate in the land to the complainant, who filed a bill for a decree declaring that the husband obtained an equitable estate by the curtesy in the premises, and establishing his own title thereto. From the decree in favor of the complainant the defendant appealed. Depue, J., after discussing the nature of equitable estates, and whether dower and curtesy are allowed in them, says (p. 697): "In the present case the limitation over after the death of the wife, in default of an appointment by her, is to her heirs at law, to hold to them their heirs and assigns forever. Under the rule in Shelley's case such a limitation gives to the wife an estate in fee simple, in which the husband, having issue by her, would be entitled to curtesy, if her estate was a legal estate. The rule in Shelley's case is applicable to equitable as well as to legal estates, Croxall v. Shererd, 5 Wall. 268; and in no case whatever of a trust executed, have the words heirs or heirs of the body, following a limitation to the ancestor for life, received a construction in equitable estates different from that which the same limitations would receive in legal estate, 1 Preston on Estates, 386. The counsel for the defendant has, therefore, placed his denial of the right of the husband to curtesy on the ground that the trust in this instance was an executory trust. In some cases, and for certain purposes, a court of equity, where the trust is what is known as an executory trust, will so deal with it as to give effect to the general intent of the creator of it, without adherence to the strict legal effect of the

distinction consists in the manner in which the trust is declared. The doctrine of executory trusts finds one of its most striking applications in the mode of carrying into effect and enforcing marriage articles. Where such articles or agreements

terms in which it is expressed. In one sense every trust is executory. At common law every use was a trust. But by the statute of uses certain uses were converted into legal estates, and strictly speaking every trust executed is a legal estate. In this sense the trust must be executory to bring the case at all within the jurisdiction of chancery. Bagshaw v. Spencer, 1 Ves. Sen. 142, 152. But this is not the sense in which the term executory trust is used as applicable to that class of cases in which equity will deal with the subject without regard to the legal signification of the terms in which the trust is declared. The earliest reported case in which the distinction is taken between executed and executory trusts as administered in the court of chancery, is Leonard v. Countess of Sussex, 2 Vern. 526. This difference was first fully explained by Lord Chancellor Cowper in Earl of Stamford v. Hobart, 3 Bro. P. C. 31; and, notwithstanding the doubt expressed by Lord Hardwicke in Bagshaw v. Spencer, this distinction is completely settled in the English courts. The leading cases on the subject are Wright v. Pearson, 1 Eden, 119; Austen v. Taylor, 1 Id. 361; Jervoise v. Duke of Northumberland, 1 J. & W. 559; Boswell v. Dillon, Drury, 291, and Rochfort v. Fitzmaurice, 2 Dr. & War. 1, in which Lord Chancellor Sugden discusses the earlier cases on the subject. From an examination of these cases and others, the distinction will be found to rest *on the manner in which the trust is declared*. Where the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust. In such a case equity will not interfere and give effect to it on a construction different from what it would receive in a court of law. It is only where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his intent is to be carried into effect substantially in the discretion of trustees, that a court of equity regards the trust as an executory trust, and will assume jurisdiction to direct the trust to be executed upon a construction different from that which the instrument creating it would receive in a court of law. These principles are so clearly and fully stated by Lord Chancellor Sugden in Boswell v. Dillon, *supra*, that the following quotation may be profitably made from his opinion: "By the term executory trust, when used in its proper sense, we mean a trust in which some further act is directed to be done. Executory trusts in this way may be divided into two classes; one, in which, though something is required to be done (for example, a settlement to be executed), yet the testator has acted as his own conveyancer, as it is called, and defined the settlement to be made, and the court has nothing to do but to follow out and execute the intention of the party as appearing in the instrument. Such trusts, though executory, do not differ from ordinary limitations, and must be construed according to the principles applicable to legal estates depending upon the same words. [I would remark that it seems to be alike unnecessary and confusing to call such trusts executory; if they are so called, then all trusts to convey or to sell, and the like, should also be included under the same name.] The other species of executory trusts is, where the testator directing a further act, has imperfectly stated what is to be done. In such cases the court is invested with a larger discretion, and gives to the words a more liberal interpretation than they would have borne if they had stood by themselves." [Mr. Justice Depue then cites and quotes from earlier New Jersey decisions, in which the distinction had been adopted, viz.: Mullany v. Mullany, 3 Green Ch. 16; Price v. Sisson, 2 Beasl. 168; Weehawken Ferry Co. v. Sisson, 17 N. J. Eq. 475; and proceeds:] "It is obvious from what has already been said, that a mere direction to the trustee to convey in accordance with trusts which have been fully defined, will not convert a trust into an executory trust in the true sense of the term. (Egerton v. Brownlow, 4 H. L. Cas. 1, 210.) In Price v. Sisson, *supra*,

to settle are general in their terms, a court of equity presumes that it was the intention of the parties to provide for the issue of the marriage, and will therefore direct a settlement to be made which does provide for the children; and if the agree-

the deed creating the trust contained a direction to the trustee to convey, and yet the chancellor and this court regarded it as creating an executed trust, and subject to have its limitations construed by rules applicable to legal estates. The cases to the contrary are those in which the intent is expressed in general language, and the trusts are therefore imperfectly declared, so that it is apparent on the face of the instrument that it was contemplated that they should be executed by the trustees in a more accurate manner, to give effect to the intent expressed. (Lord Glenorchy v. Bosville, Cas. temp. Talb. 3; Leonard v. Lady Sussex, 2 Vern. 526; Rochfort v. Fitzmaurice, 2 Dr. & War. 1.) Or where some of the limitations are illegal, and the court is called upon to carry into effect the trusts declared as far as the rules of law will permit. (Earl of Stamford v. Hobart, 3 Bro. P. C. 31; Humbertson v. Humbertson, 2 Vern. 737.) A conveyance by the trustee may be necessary for the purpose of investing the *cestui que trust* with the legal estate; but if the trusts are fully and accurately expressed, the rights of the beneficiaries are not affected by the direction to convey; the conveyance must conform to their rights as declared, and the equitable estate immediately vests accordingly. (Stanley v. Stanley, 16 Ves. 491; Phipps v. Ackers, 9 Cl. & Fin. 583, 594, 599, 601, 604; Bowen v. Chase, 4 Otto, 812, 818.) It was further contended that this case is excepted out of these rules for the construction of trusts in a court of equity, by the fact that the trust in question was in the nature of a marriage settlement. There *is* a difference in one respect between marriage articles and a devise by will. Under the artificial rule in Shelley's Case, a gift to the ancestor for life, with a limitation over to heirs or heirs of the body, creates in him an estate in fee simple or in tail, and the limitation over is capable of destruction by him, by conveyance or devise if the estate be a fee simple, or by fine and common recovery if it be a fee tail. When these technical terms are used in an agreement for a settlement in view of marriage, the court will infer, from the nature of the agreement, that the parties contemplated provisions for the issue of the marriage, which should not be liable to immediate destruction by the act of the parties, and will direct the settlement to be made in such a manner as will prevent the destruction of the limitations over to issue. (Blackburn v. Stables, 2 V. & B. 367; Jervoise v. Duke of Northumberland, 1 J. & W. 559; Rochfort v. Fitzmaurice, 2 Dr. & War. 1, 18; Sackville-West v. Viscount Holmesdale, L. R., 4 H. L. 543.) But this doctrine is applicable only so long as the agreement for a settlement remains a matter of contract. If the parties have themselves completed the settlement by a deed complete in itself and perfect, so that it requires only to be obeyed and fulfilled by the trustees, according to the provisions of the settlement, the trust will be construed in the same manner as similar trusts created for other purposes. (Neves v. Scott, 9 How. (U. S.) 196; Tillinghast v. Coggeshall, 7 R. I. 383; Carroll v. Renich, 7 Sm. & Mar. 798.)" The court held that the settlement was a final deed of settlement and not a mere agreement to settle; that the trusts were executed and therefore that the husband was entitled to curtesy in his wife's equitable estate in fee simple. See, also, Lord Glenorchy v. Bosville, Cas. temp. Talb. 3; 1 Eq. Lead. Cas. 1, 13, 36; Egerton v. Earl of Brownlow, 4 H. L. Cas. 1; Sackville-West v. Viscount Holmesdale, L. R., 4 H. L. 543; Phipps v. Ackers, 9 Cl. & Fin. 583, 594, 599, 601, 604; Thompson v. Fisher, L. R., 10 Eq 207; Phillips v. James, 3 De G. J. & S. 72; Viscount Holmesdale v. West, L. R., 12 Eq. 280; Magrath v. Morehead, Id., Id. 491; Loch v. Bagley, Id., 4 Id. 122; *In re* Bellasis' Trust, Id., 12 Id. 218; Rochfort v. Fitzmaurice, 2 Dr. & War. 1; Boswell v. Dillon, Drury, 291; Leonard v. Lady Sussex, 2 Vern. 526; Earl of Stamford v. Hobart, 3 Bro. P. C. 31; Humbertson v. Humbertson, 2 Vern. 737; Wright v. Pearson, 1 Eden, 119; Austen v. Taylor, Id. 361; Sweetapple v. Bindon, 2

ment contains technical terms, which in a fully executed trust would admit the operation of the rule in Shelley's case, and thus render the limitations in favor of the children liable to be destroyed, the court will order the settlement to be made in such a manner as to prevent the operation of that rule and the destruction of the limitations to the issue. This doctrine is applicable, however, only when the marriage articles are an agreement for a settlement, and not when the settlement has been completed. In the case of a will there is no presumption of an intent to provide for children; the provisions of the will itself are the only guide in construing its terms. "If technical words are used, and are not modified or explained by the context, it seems that the trusts, whether executory or not, must be construed in accordance with their technical sense. Still, in the case of an executory trust created by a will, the intention so to modify the terms may be collected from slighter indications than would be sufficient in that of an executed trust."[1] It should be observed, in this connection,

Vern. 536; Papillon v. Voice, 2 P. Wms. 471; Lord Deerhurst v. Duke of St. Albans, 5 Madd. 232, 260; Jervoise v. Duke of Northumberland, 1 J. & W. 559; Bowen v. Chase, 4 Otto, 812, 818; Croxall v. Shererd, 5 Wall. 268, 281; Neves v. Scott, 9 How. (U. S.) 196; Tillinghast v. Coggeshall, 7 R. I. 383; Imlay v. Huntington, 20 Conn. 146, 162; Wood v. Burnham, 6 Paige, 513, 518; Tallman v. Wood, 26 Wend. 9, 19; Wagstaff v. Lowerre, 23 Barb. 209, 215; Mullany v. Mullany, 3 Green Ch. 16; Price v. Sisson, 2 Beasl. 168; Weehawken F. Co. v. Sisson, 17 N. J. Eq. 475; Dennison v. Goehring, 7 Barr. 175, 177; Lessee of Findlay v. Riddle, 3 Binn. 139, 152; Horne v. Lyeth, 4 Har. & J. 431, 434; Saunders v. Edwards, 2 Jones' Eq. 134; Porter v. Doby, 2 Rich. Eq. 49; Garner v. Garner, 1 Desaus. 437, 444; Berry v. Williamson, 11 B. Mon. 245, 251; Riddle v. Cutter, 49 Iowa, 547.

[1] Adams on Eq. 129. See Blackburn v. Stables, 2 V. & B. 367; Jervoise v. Duke of Northumberland, 1 J. & W. 559; Rochfort v. Fitzmaurice, 2 Dr. & War. 1, 18; Sackville-West v. Lord Holmesdale, L. R., 4 H. L. 543; Trevor v. Trevor, 1 P. Wms. 622; Austen v. Taylor, 1 Eden, 361; Neves v. Scott, 9 How. (U. S.) 196; Tillinghast v. Coggeshall, 7 R. I. 383; Carroll v. Renich, 7 Sm. & Mar. 798; Berry v. Williamson, 11 B. Mon. 245, 251; Imlay v. Huntington, 20 Conn. 146; and cases in last note.

As to executory trusts of chattels and other personal property, see Duke of Newcastle v. Countess of Lincoln, 3 Ves. 387; 12 Id. 218; Stanley v. Leigh, 2 P. Wms. 686, 690; Lord Deerhurst v. Duke of St. Albans, 5 Madd. 232; Rowland v. Morgan, 2 Phil. 764; Lord Scarsdale v. Curzon, 1 J. & H. 40; Shelley v. Shelley, L. R., 6 Eq. 540, 546.

English courts of equity exercise the very high jurisdiction of setting aside or modifying a settlement which does not carry out the presumptive intention of the articles and is not such an one as ought to have been made, and also a settlement made by a young woman which does not contain the provisions usually inserted to protect the rights of the wife or children. No fraud or undue influence or mistake need be shown; the power is a part of the jurisdiction of equity over married women and infants with respect to their property; it is used to prevent improvident settlements, made without advice, or without a due regard for the rights of the wife or children. A settlement may therefore be set aside and modified after the death of the husband. If this particular jurisdiction is ever exercised by American courts of equity, the occasions for it must be extremely

that the statutory abrogation of the rule in Shelley's case, has removed one of the most important occasions for applying the distinction between executed and executory trusts in many of the American states.

§ 1002. **Powers in Trust.**—Analogous to trusts proper, but differing from them in one essential feature, are powers in trust. In a true trust the legal title is in and by its creation always vested in the trustee, but to be held for the benefit of the beneficiary. In a trust power, as distinguished from a trust, the legal title is vested, not in the trustee, but in a third person, and the trustee has authority to convey or dispose of the property to or for or among the beneficiaries. A power generally is an authority given to A. to convey or dispose of an interest which he does not himself hold, and of which the complete legal title is vested in another person, B.[1] Where the power is not coupled with a trust, A. is clothed with a complete discretion whether he will or will not execute it; courts of equity do not control that discretion; if he utterly fails to make any appointment, they do not relieve the expected beneficiaries to or among whom the disposition might have been made. Where the power is in trust, A. may have some discretion with respect to the mode in which he shall exercise it, with respect to the amounts distributed among a designated class of beneficiaries, and the like; but he has no discretion as to whether he will or will not exercise it at all. It partakes so much of the nature of a trust, that an obligation rests upon him, and an equitable right is held by the beneficiaries—a right which equity recognizes and, to a certain extent, protects; so that if A. does not discharge the duty resting upon him, a court of equity will, to a certain extent, discharge the duty in his stead. A trust power may therefore be defined as follows: It is an authority given to A. to dispose of property, of which the legal title is held by B., to or among a specified beneficiary or class of beneficiaries, conferred in such terms that a fiduciary or trust obligation rests upon A.

rare. Smith v. Iliffe, L. R., 20 Eq. 666, 668; Wolterbeek v. Barrow, 23 Beav. 423; Hobson v. Ferraby, 2 Coll. 412; Harbidge v. Wogan, 5 Hare, 258; Torre v. Torre, 1 Sm. & Giff. 518; Cogan v. Duffield, L. R., 20 Eq. 789; Taggart v. Taggart, 1 Sch. & Lef. 84; Warrick v. Warrick, 3 Atk. 291, 293; see Neves v. Scott, 9 How. (U. S.) 196; Garnsey v. Mundy, 24 N. J. Eq. 243 (a convevance in trust was set aside because improvident, etc., even though infant children of the grantor were beneficiaries).

[1] There are various species of powers in part depending upon the question whether the donee, A., has *any* interest in the property: thus he might have a life estate and have power to dispose of the fee; or he might have no interest whatever, and be clothed with a naked power to dispose of property entirely held by another. It is unnecessary to go into the classification of powers.

to make the disposition, although he *may* be clothed with some discretion as to the amounts or shares which he shall confer upon the individuals constituting a class of beneficiaries, or even as to the persons whom he shall select from the class to receive the entire benefit. On the other hand, the beneficiaries may be so specified that no discretion with respect to them exists.[1] When the trust power is of such a nature that the donee-trustee is authorized to dispose of the property among a class, and is clothed with a discretion, a court of equity will not interfere to control that discretion or interfere with the mode of exercising it, if he does, in fact, make an appointment. If, however, the donee-trustee fails to act at all, and makes no appointment, it is a settled rule that a court of equity, in enforcing the power on behalf of the beneficiaries, will always decree an equal distribution of the property among all the persons constituting the class. In New York, and other states which have followed the New York type of legislation, the subject of powers in trust has assumed a considerable importance. The statutes, while abolishing all express trusts, with few specified exceptions, provide that a disposition in the form of a trust, but not valid as a true trust under the statute, may still be valid and take effect as a power in trust. It follows that every kind of express active trust possible under the former system, may now be created and made effectual as a power in trust.[2]

[1] In the leading case Brown v. Higgs, 8 Ves. 561, 570, Lord Eldon said: "There are not only a mere trust and a mere power, but there is also known to this court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his own room and place."

[2] Harding v. Glyn, 1 Atk. 469; 2 Eq. Lead. Cas. 1833, 1848, 1857 (4th Am. ed.); Burrough v. Philcox, 5 My. & Cr. 72; Grant v. Lynam, 4 Russ. 292; Penny v. Turner, 2 Phil. 493; Fordyce v. Bridges, 2 Id. 497; Gough v. Bult, 16 Sim. 45; Brown v. Pocock, 6 Id. 257; Croft v. Adam, 12 Id. 639; Cole v. Wade, 16 Ves. 27, 42; Izod v. Izod, 32 Beav. 242; *Re* White's Trusts, Johns. 656; Brook v. Brook, 3 Sm. & Giff. 280; Gude v. Worthington, 3 De G. & Sm. 389; Salusbury v. Denton, 3 K. & J. 529; Minors v. Battison, L. R., 1 App. Cas. 428; Willis v. Kymer, L. R. 7 Ch. D. 181 (the trustee's discretion); Smith v. Bowen, 35 N. Y. 83; Whiting v. Whiting, 4 Gray, 236, 240; Chase v. Chase, 2 Allen, 101; Miller v. Meetch, 8 Barr, 417; Whitehurst v. Harker, 2 Ired. Eq. 292; Withers v. Yeadon, 1 Rich. Eq. 324; Collins v. Carlisle, 7 B. Mon. 13; Gibbs v. Marsh, 2 Metc. 243. In many of the English cases the appointment is to be made by way of a testamentary disposition, and the beneficiaries are aided after the death of the donee-trustee without making any appointment. Under the legislation of American states, where an express active trust takes effect only as a power in trust, the power may clearly be enforced *inter vivos* against the trustee himself, under the same circumstances in which a true trust might be enforced. Examples will be found *post*, under § 1003, in connection with this modern legislation.

§ 1003. **Legislation of Various States.**—Trusts have been regulated and limited by statute in several of the leading states, and this statutory system is so important that it demands a separate notice, and at least a general description.[1] The pre-

[1] R. S. of N. Y., pt. 2, tit. 2, ch. 1, art. 2, §45. Uses and trusts abolished, except as herein authorized. §§ 46–49. In passive trusts by will or deed the whole estate passes directly to the beneficiary. § 55. Express trusts may be created for any or either of the following purposes: 1. To sell lands for the benefit of creditors; 2. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of land, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules concerning the suspension of the power of alienation; 4. To receive rents and profits of lands, and to accumulate the same for the benefit of minors, for and during their minority. § 60. In all these express trusts the whole estate is vested in the trustee; the beneficiary takes no estate in the land, but only the right to enforce a performance by the trustee. § 63. In the third and fourth classes, the beneficiary can not assign, or in manner dispose of his interest; § 65, and the trustee is also unable to convey his interest if the trust is expressed in the instrument from which he derives his estate. §§ 75, 77, 78. Express trusts not valid under this statute are valid and effectual as powers in trust.

In the same chapter, §§ 1–21, it is provided that the power of alienation can not be suspended by a trust or other disposition, longer than during the continuance of *two* lives in being at the time when the trust or other disposition commences. The foregoing provisions, concerning express trusts, relate exclusively to trusts of real property. Trusts of personal property, with respect to their form and kind and object, are not restricted, except that they are all subject to the limitations concerning the suspension of the power of alienation.

Michigan, Comp. Laws (1871), v. 2, p. 1331. The system is substantially the same as that of New York, with some additions to the express trust allowed. § 11. The following express trusts are authorized. The first, second, and third classes are identical with the corresponding classes of the New York statute: (4) To receive the rents and profits of lands and to accumulate the same for the benefit of any married woman, or for the benefit of minors during their minority; (5) For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations concerning the suspension of the power of alienation. Vol. 2, p. 1326, § 15. The power of alienation can only be suspended during two lives in being, as in New York.

Wisconsin.—R. S., Taylor's ed. (1872), vol. 2, p. 1129, § 11. The express trusts authorized are identical with those of the Michigan statute; p. 1124, §§ 15, 16, the limitations upon the suspension of the power of alienation are the same as in New York and Michigan.

Minnesota.—Gen. Stat., Young's ed. (1878), p. 553, § 11. The four classes of express trusts of land authorized are the same as the four classes of the New York statute. To these is added; (5) To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind, and to invest and loan the same for the benefit of the beneficiaries of such trust, subject to the control of the courts over the acts of the trustee.

California.—Civil Code. The general system is the same as that of New York. § 847. No trusts permitted except those authorized. § 863. In all express trusts the whole estate vests in the trustee. § 867. The beneficiary may be restrained from disposing of his interest. §§ 869, 879. If the trust is declared in the conveyance to the trustee, every act or transfer of his in contravention of the trust is absolutely void; if the trust is not so declared, it is invalid as against a *bona fide* purchaser from the trustee. The express trusts authorized are somewhat broader than those of the New York statute. § 857. The following classes of express trusts are authorized: (1) To sell real property and apply or dispose of the proceeds in

vailing type originated in New York, and has been followed in Michigan, Wisconsin, Minnesota, California, and Dakota. The important and distinctive features which constitute this type, so far as it deals with express trusts of land, are the following: (1) All uses, and all express *passive* trusts, and all express *active* trusts, except certain enumerated kinds, are abolished. (2) Certain kinds of express active trusts are allowed, wherein the trustee has the whole estate and management, and the beneficiary has no estate equitable or legal, but only the right to enforce the performance of the trust according to its terms against the trustee. These permitted species are all made subject to the rules concerning perpetuities, or the periods during which the absolute power of alienation may be suspended. (3) Trusts of personal property are not embraced within this scheme, and are not substantially modified or limited, except that they are subject to the rules concerning perpetuities. (4) When the trust is declared in the instrument by which the estate is conveyed to the trustee, any transfer or other act of his in contravention of the trust is absolutely void; when the trust is not declared in that conveyance, it becomes inoperative as against a *bona fide* purchaser for valuable consideration and without notice of the trust. (5) In those species which are for the permanent benefit of the beneficiary—that is, those which are not trusts to sell or dispose of the property—the beneficiary either is or may be made unable to assign or transfer his in-

accordance with the instrument creating the trust. (2) To mortgage or lease real property as in same class of the New York statute. (3) To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter time, subject to the rules concerning the suspension of the power of alienation; (4) To receive rents and profits and accumulate the same for minors, as in New York. §§ 715, 716, 722–726, 771. Suspension of the power of alienation can only last during the continuance of *lives in being* (not *two* lives) at the creation of the trust. § 2220. Express trusts of personal property are allowed for any purpose for which a contract may lawfully be made.

Dakota.—Civil Code (ed. of 1880), p. 243, § 282. Identical with that of California.

Georgia.—Although the legislation of this state does not follow the foregoing type, the code contains the following provisions, which *may* limit the extent to which express trusts can be created. Code (1873), p. 399, § 2305. "Estates may be created not for the benefit of the grantee, but for the use of some other person. They are termed trust estates. No formal words are necessary to create such an estate. Whenever a manifest intention is exhibited that another person shall have the benefit of the property, the grantee shall be declared a trustee. § 2306. Trust estates may be created for the benefit of any female, or minor, or person *non compos mentis.*" See Gordon v. Green, 10 Ga. 534; Russell v. Kearney, 27 Id. 96; Ingram v. Fraley, 29 Id. 553; Logan v. Goodall, 42 Id. 95; Sutton v. Aiken, 62 Id. 733; Coughlin v. Seago, 53 Id. 259; Adams v. Guerard, 29 Id. 651; Bowman v. Long, 26 Id. 142; Boyd v. England, 56 Id. 598.

terest. (6) The general powers, duties, and liabilities of the trustees as established by the doctrines of equity jurisprudence are not otherwise altered. The portions of this system which relate to trusts arising by operation of law—resulting and constructive—will be described in a subsequent section.

§ 1004. **Judicial Interpretation; Validity of Trusts.**—The following are among the most important results of the judicial interpretation given to these statutory provisions. Since all passive trusts of land are abolished, a conveyance or devise of real property to A., merely in trust for, or to the use of B., would not be void, but would vest the entire estate legal and equitable in B., as though the transfer had been made directly to him; and the same effect would be produced if the grantor should attempt to create a trust upon a trust, by any form of limitation to A. to the use of B. in trust for C.[1] The first class of express trusts, according to the form of the New York statute, is strictly confined to sales for the benefit of creditors; by the form of the California statute, the class clearly includes every kind of active trust which empowers the trustee to sell or convey the trust land.[2] The second class permits a trust to mortgage or lease lands, and with the money raised by the mortgage, or the rents from the leasing, to pay any kind of testamentary gift, or to pay off any incumbrance which may be on the land, but not for the purpose of paying general creditors.[3] The third class authorizes a most useful kind of trust in marriage

[1] This has been expressly settled in New York, and there can be no doubt that the same result would take place in the other states. Even if the statute of uses of Hen. VIII. is not regarded as re-enacted, the provisions of the modern statutes abolishing passive uses and trusts are based upon the same policy as the original legislation. And since these state statutes are more mandatory in their language, there seems to be no room left for the interpretation which permitted a passive trust to be created by means of a use limited upon a use. Knight v. Weatherwax, 7 Paige, 182; Braker v. Doveraux, 8 Id. 513, 518; Johnson v. Fleet, 14 Wend. 176, 180, *per* Nelson, J.; Rathbun v. Rathbun, 6 Barb. 98; Knickerbocker Ins. Co. v. Hill, 3 Hun, 577; Rawson v. Lampman, 5 N. Y. 456; Wright v. Douglass, 7 Id. 564; Astor v. L'Amoreux, 4 Sandf. 524; and see Hill v. Den, 54 Cal. 6; Wormouth v. Johnson, 8 Pac. L. J. 362; Patton v. Chamberlain, 44 Mich. 5; Toms v. Williams, 41 Id. 552.

[2] In New York a trust to sell for any other purpose than payment of creditors is void *as a trust*, but valid and effectual as a power in trust. Selden v. Vermilyea, 1 Barb. 58. In California, the following are illustrations: Sale for benefit of creditors: Grant v. Burr, 54 Cal. 208; Bateman v. Burr, 7 Pac. L. J. 274; Gschwend v. Estes, 51 Cal. 134; Sharp v. Goodwin, 51 Id. 219; Tyler v. Granger, 48 Id. 259; Thompson v. McKay, 41 Id. 221, 230; Learned v. Welton, 40 Id. 349; Handley v. Pfister, 39 Id. 283. For benefit of legatees: Estate of Delaney, 49 Cal. 76, 86; Auguisola v. Arnaz, 51 Id. 435, 438. In my opinion, this form would include a trust simply to convey the land to some designated person or class, for the validity of the trust can not depend upon the amount of the proceeds.

[3] Lang v. Ropke, 5 Sandf. 363.

and family settlements, and in testamentary provisions for widows and children. If the provisions of the trust unduly suspend the power of alienation, it is void. It should be observed that attempted trusts not valid as conforming to this class, may be effectual as powers in trust.[1] By one form of the fourth class a trust is authorized to accumulate income for the benefit of minors in being, and not longer than during their minority; every other form of accumulation is prohibited. By the other form the accumulation is permitted for the benefit of married women as well as minors.[2]

§ 1005. **Interest, Rights, and Liabilities of the Beneficiary.**—Although the beneficiary in all these classes of express trusts takes no estate, this does not prevent him from taking or holding the estate, or being vested with the ultimate estate, after the trust is ended.[3] He also has a right, a thing in action; and how far this is assignable or may be reached by his creditors, depends upon the nature and particular provisions of the trust.[4]

[1] The number of New York decisions concerning this species is great, discussing and settling many questions of detail. The following are the most important: Lorillard's Case, 14 Wend. 265; Hawley v. James, 16 Id. 61; Kane v. Gott, 24 Id. 641; Hone's Ex'rs v. Van Schaick, 20 Id. 564; Moore v. Moore, 47 Barb. 257; Burke v. Valentine, 52 Id. 412; Killam v. Allen, Id. 605; Leggett v. Perkins, 2 N. Y. 297; Amory v. Lord, 9 Id. 403; Savage v. Burnham, 17 Id. 561; Beekman v. Bonsor, 23 Id. 298; Downing v. Marshall, Id. 366; Gilman v. Reddington, 24 Id. 9; Everitt v. Everitt, 29 Id. 39; Post v. Hover, 33 Id. 593; Harrison v. Harrison, 36 Id. 543; Schettler v. Smith, 41 Id. 328; Manice v. Manice, 43 Id. 303; Vernon v. Vernon, 53 Id. 351; Kiah v. Grenier, 56 Id. 220; Heermans v. Robertson, 64 Id. 332; Provost v. Provost, 70 Id. 141; Stevenson v. Lesley, Id. 512; Verdin v. Slocum, 71 Id. 345; Garvey v. McDevitt, 72 Id. 556; Low v. Harmony, Id. 408; Moore v. Hegeman, Id. 376; Heermans v. Burt, 78 Id. 259; Donovan v. Van De Mark, Id. 244; Ireland v. Ireland, 84 Id. 321; Delancy v. Van Aulen, Id. 16; Toms v. Williams, 41 Mich. 552; Meth. Church etc. v. Clark, Id. 730; Lyle v. Burke, 40 Id. 499; Smith v. Ford, 48 Wisc. 115; White v. Fitzgerald, 19 Id. 489; Goodrich v. City of Milwaukee, 24 Id. 422; overruling Marvin v. Titsworth, 10 Id. 320; Cutter v. Hardy, 48 Cal. 568; Estate of Delaney, 49 Id. 76.

[2] For construction, see Hawley v. James, 16 Wend. 61; Vail v. Vail, 4 Paige, 317, 328; Morgan v. Masterton, 4 Sandf. 442; Harris v. Clark, 7 N. Y. 242; Kilpatrick v. Johnson, 15 Id. 322; Dodge v. Pond, 23 Id. 69; Gilman v. Reddington, 24 Id. 9; Toms v. Williams, 41 Mich. 552.

[3] Stevenson v. Lesley, 70 N. Y. 512.

[4] In all trusts of the first and second classes, where a fixed sum is to be paid to the beneficiary, as to the creditor, a legatee, etc., he may clearly assign his right, so that the assignee would become entitled to the payment. The interest of the beneficiary in these kinds is also plainly subject to be reached by his creditors. In trusts of the third and fourth classes, even without any statutory prohibition, it seems inconsistent with the whole scheme that the rights of the beneficiary should be assignable. In several of the states following the New York type, his power to assign is expressly taken away; in California he may be restrained from assigning by the terms of the trust (Civ. Code, § 867).

In trusts of the third class, to receive rents and profits for the beneficiary, if there is no valid provision for their accumulation, the surplus of the income over what is reasonably necessary under all the circumstances for his support, education, etc., may be reached by the creditors of the ben-

The entire estate is vested in the trustee, but his power to make a valid sale and conveyance will depend upon the nature of the trust and the form of the instrument by which it is declared.[1]

SECTION III.

HOW EXPRESS TRUSTS ARE CREATED.

ANALYSIS.

§ 1006. Trusts of real property; statute of frauds; writing necessary.
§ 1007. Written declaration by the grantor; ditto, by the trustee; examples.
§ 1008. Trusts of personal property may be created verbally; what trusts are not within the statute.
§ 1009. Words and dispositions sufficient to create a trust; examples.
§§ 1010–1017. Express trusts inferred by construction, sometimes improperly called "implied trusts."
§ 1011. (1) From the powers given to the trustee.
§ 1012. (2) Provisions for maintenance; examples.
§ 1013. (3) To carry out purposes of the will.

eficiary, by means of a proper equitable action. The trust may authorize the application of the income for the support of the beneficiary's family as well as of himself; in such a case only the surplus over what was needed for both could be reached. It is also settled by the decisions that a provision to the effect that the rights of the beneficiary should cease, and the trust should shift on behalf of another person—e. g. the beneficiary's wife—in case a judgment was recovered against him, or in case his interest became liable to the claims of creditors, is valid and operative. See Noyes v. Blakeman, 3 Sandf. 531; 6 N. Y. 567; Bramhall v. Ferris, 14 N. Y. 41; Graff v. Bonnett, 31 Id. 9; Campbell v. Foster, 35 Id. 361; Williams v. Thorn, 70 Id. 270; 81 Id. 381; Cruger v. Jones, 18 Barb. 467; Genet v. Beekman, 45 Id. 382; Kennedy v. Nunan, 52 Cal. 326. In trusts of the fourth class, to accumulate for the benefit of minors, the interest of the beneficiaries is clearly beyond the reach of their creditors during the existence of the trust.

[1] In trusts of the first class, being expressly created for the purpose of a sale, the trustee may of course sell and convey a good title; see Learned v. Welton, 40 Cal. 349; Thompson v. McKay, 41 Id. 221, 230; Sprague v. Edwards, 48 Id. 239; Saunders v. Schmælzle, 49 Id. 59. In trusts of the other kinds, the trustee has no authority to sell or convey. Still if the trust is not declared in the same instrument by which the land is conveyed to the trustee, a purchaser from him without notice of the trust, and for a valuable consideration, takes a good title freed from the trust; a purchaser with notice, or without a valuable consideration, takes the land subject to the trust, and becomes himself a trustee. Holden v. N. Y. & Erie B'k, 72 N. Y. 286; New v. Nicoll, 73 Id. 127; Griffin v. Blanchar, 17 Cal. 70; Thompson v. Toland, 48 Id. 99; Sharp v. Goodwin, 51 Id. 219; Scott v. Umbarger, 41 Id. 410; Price v. Reeves, 38 Id. 457; Lathrop v. Bampton, 31 Id. 17. When the trust is declared in the same instrument by which the land is conveyed to the trustee, every sale or other act by him in contravention of the trust is absolutely void; a purchaser or grantee would obtain no title whatever. Powers v. Bergen, 6 N. Y. 358; Belmont v. O'Brien, 12 Id. 394; Smith v. Bowen, 35 Id. 83; Briggs v. Palmer, 20 Barb. 392; Cruger v. Jones, 18 Id. 467; Leitch v. Wells, 48 Id. 637.

§ 1014. (4) From "precatory" words; Knight v. Knight; examples.
§ 1015. Modern tendency to restrict this doctrine; in the United States.
§ 1016. What intention necessary to create the trust; the general criterion; examples.
§ 1017. Objections to the doctrine.

§ 1006. **Trusts of Real Property; Statute of Frauds.**—Before the statute of frauds trusts of real as well as personal property could be created or declared—technically *averred* —verbally.[1] The original statute of frauds provides that "all declarations or creations of trusts, or confidences in any lands, tenements, or hereditaments shall be *manifested* and *proved* by some writing signed by the party who is by law enabled to declare the trust, or by his last will in writing, or else they shall be utterly void;" also, that "all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise [as mentioned in § 5], or else shall likewise be utterly void." This last clause refers to assignments by the *cestui que trust*. Analogous statutes have been enacted in the American states.[2] It is the settled doctrine, in interpreting this legislation, that a trust of land need not be created nor declared by a writing; it need only be manifested and proved by some writing duly signed or subscribed by the proper party; and as a consequence this written evidence *may* be a separate instrument either simultaneous with or subsequent to the deed of conveyance, and may be very informal.[3]

§ 1007. **Written Declaration by the Grantor, or by the Trustee.**—The written evidence of the trust which will satisfy

[1] It seems however that this power of declaring a trust of land verbally did not exist when the land was conveyed by a deed absolute on its face; only applying to conveyances by feoffment without a deed. See Fordyce v. Willis, 3 Bro. Ch. 577, 587; Adlington v. Cann, 3 Atk. 141, 149, 151; Osterman v. Baldwin, 6 Wall, 116; Murphy v. Hubert, 7 Barr, 420; Shelton v. Shelton, 5 Jones' Eq. 292; Anding v. Davis, 38 Miss. 574; but see Dean v. Dean, 6 Conn. 285.

[2] 29 Car. II., ch. 3, §§ 7, 8, 9. The § 5 referred to in the clause above quoted, prescribed the mode of executing a will of land. The American statutes differ considerably from the English, and among themselves, in their language. Still, unless the terms of a particular statute are *radically* a departure from the original type, and are mandatory in form, requiring the trust to be *created* by the conveyance itself, the interpretation adopted by the English courts prevails through the American states; the various statutes are regarded as substantially the same. Perry on Trusts, § 81.

[3] Forster v. Hale, 3 Ves. 696; Denton v. Davies, 18 Id. 499, 503; Ambrose v. Ambrose, 1 P. Wms. 322; Davies v. Otty, 33 Beav. 540; Gardner v. Rowe, 2 S. & S. 346; 5 Russ. 258; Smith v. Matthews, 3 De G. F. & J. 139; Movan v. Hays, 1 Johns. Ch. 339, 342; Pinney v. Fellows, 15 Vt. 525; Sime v. Howard, 4 Nev. 473, 483; Flagg v. Mann, 2 Sumn. 486; Cornelius v. Smith, 55 Mo. 528.

the statute, *may* come from the grantor—the one who intends that a trust shall be created for a certain beneficiary, or from the trustee—the grantee to whom the land is conveyed for the purposes of the trust, but not from the *cestui que trust.* The grantor may declare the trust in the will or the deed by which the land is conveyed or devised, or in an instrument separate and distinct from the conveyance; or he may declare himself a trustee and that he holds the land in trust, without conveying the legal title.[1] When the trust is not created in and by the instrument of conveyance, it may be sufficiently declared and evidenced by the trustee to whom the land is conveyed, or who becomes holder of the legal title; and this may be done by a writing executed simultaneously with or subsequent to the conveyance, and such writing may be of a most informal nature.[2]

[1] Patton v. Beecher, 62 Ala. 579 (an express trust can not be created by parol on a deed absolute on its face); Wallace v. Wainwright, 87 Pa. St. 263; Hearst v. Pujol, 44 Cal. 230, 235; Miles v. Thorne, 38 Id. 335; Taylor v. Sayles, 57 N. H. 465; Barnes v. Taylor, 27 N. J. Eq. 259; Tanner v. Skinner, 11 Bush, 120 (a party declaring himself a trustee); Urann v. Coates, 109 Mass. 581 (a memorandum signed by a decedent not addressed to any person, found among his papers, a sufficient declaration of trust with respect to certain land, constituting him a trustee); Lynch v. Clements, 24 N. J. Eq. 431 (while a grantor may declare a trust in a separate instrument accompanying the deed, a testator who devises land can not declare a trust in a valid manner by means of a separate writing which is not duly executed with the formalities required for the execution of a will, even though the writing is referred to in the will); Homer v. Homer, 107 Mass. 82 (a mere memorandum in a ledger is not sufficient); Bragg v. Paulk, 42 Me. 502; Bates v. Hurd, 65 Id. 180; McClellan v. McClellan, 65 Id. 500; Packard v. Putnam, 57 N. H. 43; Faxon v. Folvey, 110 Mass. 392; Movan v. Hays, 1 Johns. Ch. 339; Gomez v. Tradesmen's B'k, 4 Sandf. 102, 106; Harrison v. McMennomy, 2 Edw. Ch. 251; Wright v. Douglass, 7 N. Y. 564; Cook v. Barr, 44 Id. 156; Duffy v. Masterson, 44 Id. 557; Berrien v. Berrien, 3 Green Ch. 37; Ivory v. Burns, 56 Pa. St. 300; Raybold v. Raybold, 8 Harris, 308; Maccubbin v. Cromwell, 7 Gill & J. 164; Johnson v. Ronald, 4 Munf. 77; Skipwith's Ex'r v. Cunningham, 8 Leigh, 271 (the *cestui que trust* need not join in executing the writing); Reid v. Reid, 12 Rich. Eq. 213; Gibson v. Foote, 40 Miss. 788; Kingsbury v. Burnside, 58 Ill. 310; Sime v. Howard, 4 Nev. 473, 482. The grantor may declare the trust by an instrument separate from the conveyance to the trustee. Wood v. Cox, 2 My. & Cr. 684 (a separate testamentary paper); Smith v. Attersoll, 1 Russ. 266 (a paper accompanying a will although not duly executed as a will; see *per contra* Lynch v. Clements, *supra*); Inchiquin v. French, 1 Cox, 1; but the separate instrument must be contemporaneous with the conveyance, or a part of the same single transaction; where the title has been vested in a grantee, his rights can not be defeated by a subsequent and wholly independent act of the grantor. Adlington v. Cann, 3 Atk. 141, 145; Crabb v. Crabb, 1 My. & K. 511; Kilpin v. Kilpin, 1 Id. 520, 532; De Laurencel v. De Boom, 48 Cal. 581; Chapman v. Wilbur, 3 Oreg. 326; Bennett v. Fulmer, 13 Wright, 155; Brown v. Brown, 12 Md. 87.

[2] Letters, recitals, memoranda, etc., have been held sufficient evidence of a trust. Smith v. Matthews, 3 De G. F. & J. 139; Gardner v. Rowe, 2 S. & S. 346; 5 Russ. 258; Dale v. Hamilton, 2 Phil. 266; Forster v. Hale, 3 Ves. 696; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267 (notice in writing given by the grantee stating that the property in fact belonged to certain named beneficiaries, a suf-

The trustee's acceptance of the trust may be express by his executing the conveyance or other instrument, or by assenting to the will; or it may be inferred from his dealing with the property; and *prima facie* he is presumed to accept.[1] An acceptance by the trustee is necessary in order to bind him, but not in order to validate the trust. A refusal to accept or disclaimer frees the trustee named from any duty to act under the trust, but the rights of the beneficiary do not depend upon his acceptance. A court of equity never suffers an express trust to fail from want of a trustee.[2]

§ 1008. **Trusts of Personal Property may be Created Verbally.**—The provisions of the statute of frauds apply to

ficient declaration of trust); Rogers Locomotive etc. Works v. Kelly, 19 Hun, 399 (receipt by a bank that money deposited was in trust for specified purposes); Bates v. Hurd, 65 Me. 180 (a distinct written statement specifying the terms of the trust, and the parties to it, subscribed by the trustee, whether addressed to or delivered to the *cestui que trust* or not, or whether intended to be evidence of the trust or not when made, is a sufficient declaration); McClellan v. McClellan, 65 Me. 500 (it is sufficient that a trust is declared by a writing subscribed by the trustee subsequent to the conveyance); De Laurencel v. De Boom, 48 Cal. 581 (testator devised land to A. on the face of the will absolutely; on the same day the will was executed, testator wrote a letter to A., stating that the devise was on trust for certain purposes which were sufficiently specified; afterwards, and during testator's life-time, A., in writing, acknowledged the letter, accepted the trusts, and promised to carry them out. Held, that the express trust was declared and A. took the land as a trustee); Tanner v. Skinner, 11 Bush, 120 (explicit statement by a party declaring himself a trustee); Moore v. Pickett, 62 Ill. 158 (letter written by the trustee; and the lands mentioned in the letter as affected by the trust may be identified by evidence of the surrounding circumstances); Kingsbury v. Burnside, 58 Ill. 310 (by letter of trustee); Johnson v. Deloney, 35 Tex. 42 (the same); Phelps v. Seely, 22 Gratt. 573 (the same); Baldwin v. Humphrey, 44 N. Y. 609 (grantees declaring themselves trustees by a written agreement); Packard v. Putnam, 57 N. H. 43; Ivory v. Burns, 56 Pa. St. 300. Even where there has been no other writing, the admissions by a party defendant in an answer in chancery may be a sufficient declaration of trust; Patton v. Chamberlain, 44 Mich. 5; Broadrup v. Woodman, 27 Ohio St. 553; McLaurie v. Partlow, 53 Ill. 340; Cozine v. Graham, 2 Paige, 177; Maccubbin v. Cromwell, 7 Gill & J. 157, 164. As to the defendant's denial of the alleged parol agreement, or his express pleading of the statute, in his answer, see Ontario B'k v. Root, 3 Paige, 478; Dean v. Dean, 1 Stockt. Ch. 425; Wolf v. Corby, 30 Md. 356, 360; Billingslea v. Ward, 33 Md. 48, 51; Allen v. Chambers, 4 Ired. Eq. 125.

[1] Montford v. Cadogan, 17 Ves. 485, 489; 19 Id. 635, 638; Urch v. Walker, 3 My. & Cr. 702; Kirwan v. Daniel, 5 Hare, 493; Eyrick v. Hetrick, 13 Pa. St. 488, 493; Flint v. Clinton Co., 12 N. H. 430, 432; Lyle v. Burke, 40 Mich. 499; Hearst v. Pujol, 44 Cal. 230, 235.

[2] Whether the want arises from the fact that no trustee was named, or from the trustee's refusal to act, or from other cause, the court will appoint a trustee, or will treat the person in whom the legal title is vested as a trustee. King v. Donnelly, 5 Paige, 46; Cushney v. Henry, 4 Id. 345; Shepherd v. McEvers, 4 Johns. Ch. 136; Crocheron v. Jaques, 3 Edw. Ch. 207; De Barante v. Gott, 6 Barb. 492; Griffith's Adm'r v. Griffith, 5 B. Mon. 113; Furman v. Fisher, 4 Coldw. 626; Peter v. Beverly, 10 Peters, 532; Druid Park etc. Co. v. Oettinger, 53 Md. 46; Adams v. Adams, 21 Wall. 185 (the trustee's refusal to accept does not impair the beneficiary's rights).

chattels real;[1] but not to money secured by mortgages and other charges upon land.[2] Nor does the statute extend to trusts of pure personalty; and such trusts may therefore be created, declared, or admitted verbally, and proved by parol evidence; although the consensus of authorities demands clear and unequivocal evidence.[3] Trusts which arise by operation of law—resulting and constructive trusts—are in express terms excepted from the statute.

§ 1009. **Words or Dispositions Sufficient to Create a Trust.**—What words or dispositions either in the written or the verbal declaration, do or do not operate to create a trust? It is assumed in the present discussion that the property is directly conveyed to or is held by the person alleged to be a trustee. In the first place, as has already been shown, a mere voluntary promise to give property in trust does not create a trust, nor any right which a court of equity will enforce.[4] In the second

[1] Forster v. Hale, 3 Ves. 696; Riddle v. Emerson, 1 Vern. 108.

[2] Benbow v. Townsend, 1 My. & K. 506; Bellasis v. Compton, 2 Vern. 294.

[3] McFadden v. Jenkyns, 1 Phil. 153, 157; Hawkins v. Gardiner, 2 Sm. & Giff. 441, 451; Clapp v. Emery, 98 Ill. 523 (a son collected and invested in his own name money of his mother, held his parol statement showed a trust, and not a mere loan); Hon v. Hon, 70 Ind. 135 (trust in personal property created verbally); Reiff v. Horst, 52 Md. 255 (a son-in-law receiving money from his father-in-law verbally agreed to hold it and also another sum previously received, in trust for his own children, held a trust was impressed on *both* sums); Davis v. Coburn, 128 Mass. 377 (a trust in personal property may be shown by parol evidence); Chace v. Chapin, 130 Mass. 128 (the same); Gadsden v. Whaley, 14 S. C., 210 (a person may create a trust in personal property by verbally declaring himself a trustee for the donee; no particular form of words is necessary, and the trust *may* be proved by circumstances as well as by direct evidence of the declarations); Ray v. Simmons, 11 R. I. 266 (an owner of personalty may verbally declare that he holds it in trust for another; e. g., A. depositing money in a bank in his own name may orally declare that he holds it as trustee for B.); Silvey v. Hodgdon, 52 Cal. 363 (A. took out a policy of insurance on his own life in name of his daughter B. and on the face of it in her favor; a verbal agreement was made that she should hold it in trust for all A.'s children: *Held*, that a valid trust was created—a very instructive case); Eaton v. Cook, 25 N. J. Eq. 55 (an oral direction by a creditor to his debtor to hold the money due in trust for A. creates a valid trust in favor of the donee A.); Hooper v. Holmes, 3 Stockt. Ch. 122; Kimball v. Morton, 1 Halst. Ch. 26, 31; Barkley v. Lane's Ex'r, 6 Bush, 587; Higgenbottom v. Peyton, 3 Rich. Eq. 398; Maffitt's Adm'r v. Rynd, 69 Pa. St. 380 (although upon a conveyance of land a verbal declaration of trust in favor of the grantor or other person is void under the statute, yet such a verbal declaration by the grantee after a conversion of the land into money, creates a valid trust with respect to the proceeds). See Lister v. Hodgson, L. R., 4 Eq. 30.

[4] Young v. Young, 80 N. Y. 422; Estate of Webb, 49 Cal. 541; and see *ante*, §§ 997, 998, under head of "voluntary trusts." On the same principle, a mere unfinished, inchoate purpose expressed, does not create a trust, Bayley v. Boulcott, 4 Russ. 345; Donohoe v. Conrahy, 2 Jo. & Lat. 688, 694; Dellinger's Appeal, 71 Pa. St. 425; nor the mere expression that the property was "intended" for a certain person; Hays v. Quay, 68 Pa. St. 263.

place, no precise form of words is necessary to create a trust, but the intention must be clear. The fact that a trust of lands *is created* must not only be manifested and proved by a writing properly executed, but it must also be manifested and proved by such a writing what the trust is. The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal, that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail.[1] No particular technical words need be used; even the

[1] It does not follow that the grantee, devisee, or legatee takes the property absolutely free from the trust in such case; if the trust attempted to be created fails for reason of uncertainty, and the instrument shows an intention that the immediate donee was not to take and hold the beneficial interest, then a trust results to the donor (see *post*, § 1032). Knight v. Boughton, 11 Cl. & Fin. 513; Smith v. Matthews, 3 De G. F. & J. 139; Briggs v. Penny, 3 Macn. G. 546; Williams v. Williams, 1 Sim., N. S., 358; Reeves v. Baker, 18 Beav. 372; Stubbs v. Sargon, 2 Keen, 255; Cruwys v. Colman, 9 Ves. 319, 323, *per* Sir Wm. Grant; Steere v. Steere, 5 Johns. Ch. 1; Porter v. B'k of Rutland, 19 Vt. 410; Carpenter v. Cushman, 105 Mass. 417, 419; Inhab. of Freeport v. Bartol, 3 Greenl. 340; Brown v. Combs, 5 Dutch, 36; Harris' Ex'rs v. Barnett, 3 Gratt. 339; Rutledge v. Smith, 1 McCord Eq. 119; Norman v. Burnett, 25 Miss. 183; Mercer v. Stark, 1 Sm. & Mar. Eq. 479; Barkley v. Lane's Ex'r, 6 Bush, 587; Slocum v. Marshall, 2 Wash. C. C. 397; Russell v. Switzer, 63 Ga. 711 (certainty necessary); Hill v. Den, 54 Cal. 6 (a conveyance by A. to himself and his brother jointly as trustees for A.'s children); Smith v. Ford, 48 Wisc. 115 (trust created by express words on behalf of grantor's wife and children); Chili First Pres. Soc. v. Bowen, 21 Hun, 389 (no valid trust without a certain beneficiary); Wallace v. Wainwright, 87 Pa. St. 263 (a trust exists where the legal estate is in one person and the equitable in another); Cockrell v. Armstrong, 31 Ark. 580 (express words not necessary, the intention to be gathered from the whole instrument); Smith v. Bowen, 35 N. Y. 83 (the words "all my estate, both real and personal, I give to my wife, to be used and disposed of at her discretion for the benefit of herself and my daughters M., L., and A.," held to create a trust in favor of the daughters with respect to three fourths of the property); Zuver v. Lyons, 40 Iowa, 510 (a trust to A for life and after his death the title in fee to vest in his heirs, creates a trust estate in A. during his life, and remainder in fee to his heirs, contrary to the rule in Shelley's Case); McElroy v. McElroy, 113 Mass. 509 (where a deed to A. expressly creates a trust in favor of B., the *habendum* clause and the covenants do not necessarily limit the interest of the *cestui que trust*, nor give any beneficial interest to the grantee A.) Under the peculiar law of Pennsylvania, an express trust can not be effectively created in behalf of a woman, unless she is married, or unless it is created in contemplation of her marriage. Snyder's Appeal, 92 Pa. St. 504; Pickering v. Coates, 10 Phila. 65; Ash v. Bowen, Id. 96. No trust will be created where the property to be the subject-matter is left uncertain. Bardswell v. Bardswell, 9 Sim. 319; Winch v. Brutton, 14 Id. 379; Fox v. Fox, 27 Beav. 301; Lechmere v. Lavie, 2 My. & K. 197; Cowman v. Harrison, 10 Hare, 234; Palmer v. Simmonds, 2 Drew. 221; nor where the objects are left uncertain. Green v. Marsden, 1 Id. 646; White v. Briggs, 2 Phil. 583. "Trust" and "trustee" not essential,

words "trust" or "trustee" are not essential; any other words which unequivocally show an intention that the legal estate was vested in one person, but to be held in some manner, or for some purpose on behalf of another, if certain as to all other requisites, are sufficient. On the other hand, if the words "trust" or "trustee" are employed, they do not necessarily show an intention to create or declare a trust. It sometimes happens that an express trust arises, not from any definite words, but from the entire dispositions contained in the will, deed, or other instrument, or from a construction of all its terms. Some examples of such trusts, both in real and in personal property, are given in the foot-note as illustrations.[1]

but their omission *might* be a strong evidence of the intention. King v. Denison, 1 V. & B. 260, 273; Crockett v. Crockett, 1 Hare, 451; Raikes v. Ward, Id. 445; Jubber v. Jubber, 9 Sim. 503; Inderwick v. Inderwick, 13 Id. 652; Bibby v. Thompson, 32 Beav. 646; Porter v. B'k of Rutland, 19 Vt. 410; Aynesworth v. Haldeman, 2 Duv. 565, 571; Tobias v. Ketchum, 32 N. Y. 319, 327, 328; Smith v. Bowen 35 Id. 83; Sheets' Estate, 52 Pa. St. 257, 266; and "trust" or "trustee" do not always show a trust. Brown v. Combs, 5 Dutch. 36; Att'y-gen. v. Merrimack M. Co., 14 Gray, 586, 612; Selden's Appeal, 31 Conn. 548; Freedley's Appeal, 60 Pa. St. 344; Richardson v. Inglesby, 13 Rich. Eq. 59; Eldridge v. The See Yup Co., 17 Cal. 44. Sir Wm. Grant said in Cruwys v. Colman, 9 Ves. 319, 323, that three things are indispensable to constitute a valid trust: (1) Sufficient words to raise it; (2) a definite subject; and (3) a certain or ascertained object. It is the well-settled rule that although the purpose to create a trust is evident, still where the terms of its creation are so vague and indefinite that a court of equity can not clearly ascertain either the objects or the persons who are to take, the trust will be held to fail, and the property will fall into the general fund of the author. Power v. Cassidy, 79 N. Y. 602, 609, *per* Miller, J.; Fowler v. Garlike, 1 Russ. & M. 232; Stubbs v. Sargon, 2 Keen, 255; 3 My. & Cr. 507; Wood v. Cox, 2 Id. 684; Wheeler v. Smith, 9 How. (U. S.) 55, 79. This requisite applies with special force to private trusts; public or charitable trusts are governed by a much less stringent rule.

[1] Examples of trusts of real property. Janes v. Throckmorton, 7 Pac. L. J. 242 (an incumbered estate being conveyed to A., in consideration thereof he gave a written agreement whereby he covenanted that he would pay off the indebtedness out of the estate, and if any money or land remained after payment of all the indebtedness, he would convey one fifth part thereof to B.: *Held*, that a trust was created in favor of B., and A. having freed the estate from the incumbrances, and obtained a clear title in himself, that he held the land subject to a trust in B.'s favor with respect to one fifth thereof); Wormouth v. Johnson, 8 Pac. L. J. 362; Taft v. Taft, 130 Mass. 461 (testator devised land to his daughter with full power to dispose of the whole or any part or any of the proceeds, to devote the income, etc., to the maintenance and support of herself *and her children*, and if any portion of the estate was undisposed of during her life or by her last will, the same was to be held for her children until they became of age and then paid to them: *Held*, that no trust was created in favor of the children; but they took contingent remainders); Toms v. Williams, 41 Mich. 552; Ferry v. Liable, 31 N. J. Eq. 566 (a testator's direction to his executors to continue his business, creates a trust estate); Donovan v. Van De Mark, 78 N. Y. 244; Verdin v. Slocum, 71 Id. 345; Low v. Harmony, 72 Id. 408; Vernon v. Vernon, 53 Id. 351 (trusts under N. Y. statute); Smith v. Bowen, 35 Id. 83; Whitcomb v. Cardell, 45 Vt. 24. Examples of trusts of personal property. Trust created, or not, of money deposited in a bank. Stone v. Bishop, 4 Cliff. C. C. 593; Weber v. Weber,

§ 1010. **Express Trusts Inferred by Construction.**—There is another important class of express trusts, which are not directly and expressly declared by the terms of the instrument, but which are inferred by a construction of all the terms and dispositions. They are all cases where the court infers that it was the intention of the party to create an express trust for some purpose, although he has not expressed that intention in unequivocal and direct terms, and the court is forced to gather it from his general expressions, or from the objects and purposes of his gift. When such a trust is found by the court to have been intended by the party, it is in every respect *an express active* trust, has no resemblance whatever to a resulting or a constructive trust. It is in fact an express trust which the donor did not unmistakably declare, but which the court has helped out by interpretation and inference. To call this class "implied" trust, as is often done, is not only erroneous, but is productive of confusion and mistake.[1] These trusts ordinarily arise from a construction of the language of wills; but there is

58 How. Pr. 255; Rogers etc. Works v. Kelly, 19 Hun, 399; Ray v. Simmons, 11 R. I. 266; Martin v. Funk, 75 N. Y. 134; Boykin v. Pace's Ex'r, 64 Ala. 68 (a receipt, "received of S. P. $300 in trust for S. P., minor, to be kept and used for his benefit to the best of my ability," etc., creates a valid trust which can not be varied by parol evidence); Clapp v. Emery, 93 Ill. 523 (trust created by receiving and investing money of another with verbal declarations); Reiff v. Horst, 52 Md. 255 (trust by receiving money with verbal directions); Lyle v. Burke, 49 Mich. 499 (a written declaration of trust); Kershaw v. Snowden, 33 Ohio St. 181 (money placed in the hands of a person to be repaid on his death, held to create simply the relation of debtor and creditor, and not a trust); Gadsden v. Whaley, 14 S. C., 210 (a person verbally declares himself a trustee); Ferry v. Liable, 31 N. J. Eq. 536; Morrison v. Kinstra, 55 Miss. 71; Jones v. Kent, 80 N. Y. 585 (A. sold to B. certain stocks for a sum paid down, "and one half of whatever price the same should be sold for, when sold, over and above that sum:" *Held*, no trust created of the stocks in B.'s hands); Young v. Young, 80 N. Y. 422; People v. Mer. & Mec. Bk., 73 Ill. 269; Silvey v. Hodgdon, 52 Cal. 353 (verbal trust in a policy of life insurance); Craige v. Craige, 9 Phila. 545; Eaton v. Cook, 25 N. J. Eq. 55 (a direction by a creditor to his debtor to hold the money in trust for a third person); Kitchen v. Bedford, 13 Wall. 413 (a receipt of a "sum" in railroad bonds with a promise to expend "said sum" in the purchase of certain lands, held to constitute a trust of the securities).

[1] See Lane v. Lane, 8 Allen, 350. These trusts are in no sense *implied*, if that word is used, as it only can be properly in opposition to *express*. They are a species of express trusts, and not a class distinct from express trust. They differ from all other express trusts only in degree and not in kind. In every instance of express trust, the court must see an intention to convey or to hold the property in trust for some purpose, and this intention must be shown by the language used; in one instance the language is direct and technical, in another it is not so technical, but the meaning is equally plain; in the present instance there is no such direct language used to show that intention, and the intention is gathered from the whole instrument or from the nature of the dispositions. The term "implied" should be confined exclusively to those trusts which arise by operation of law, and are opposed to "express" trusts.

no reason on principle why they may not also arise from conveyances and agreements *inter vivos*.[1]

§ 1011. **(1) From Powers Given to the Trustees.**—Although no trust is declared in express terms, nor even mentioned, still the intention of the donor to create the trust, and the existence of the trust itself, may be necessarily inferred from the powers and authority given to the grantee, and in case of wills, even where no estate is directly devised to the executors, but the whole estate is *apparently* given to the beneficiaries, the trust may be necessarily inferred from the powers and authority conferred upon the executors, and thus from a construction of the entire will, the intention may be shown that the executors are to take the legal title as trustees of an express active trust.[2] The peculiarity of this case is, that the trust arises, and

[1] See Liddard v. Liddard, 28 Beav. 266.

[2] The case of Tobias v. Ketchum, 32 N. Y. 319, 327–331, contains so full a discussion of this important doctrine, that I shall quote from it at some length. The testator gave to his widow all the furniture and one third of the income of the land, during her life, and to his children all the rest and residue of his property, real and personal, to be equally divided among them, within six months after the widow's death. He then appointed executors and gave them power to sell real estate if necessary to make a fair division, and finally said, that he clothed them "with full power and authority to carry out all the provisions of this will," "to divide the proceeds," etc., and full power and authority to rent, lease, repair, and insure any portion of the said estate, during any period of time the same may remain unsold and undivided." Here appears to be a direct gift of income to the widow during life, and a direct gift of the whole principal to the children, to be divided after the widow's death. There is no direct gift to the executors at all; and the words "trust," or "trustee," or other similar terms, are not used. The court said (p. 327): "The first question then is, are the executors under this will made trustees of an express trust? The word trust, or trustee, is not used in the will, but that is only a circumstance to be noted in considering the question. It is by no means necessary that the donee should be expressly directed to hold the property to certain uses, or in trust, or as a trustee. * * * It is one of the fixed rules of equitable construction, that there is no magic in particular words; and any expressions that show unequivocally the intention of the parties to create a trust, will have that effect. It was said by Lord Eldon that the word trust not being made use of is a circumstance to be alluded to, but nothing more; and if the whole frame of the will creates a trust, the law is the same, though the word trust is not used (Hill on Trustees, 65 orig. ed. and cases cited). We are in this case to determine the question by the authority conferred and the duties imposed." The court then went into a full examination of the powers and duties given to the executors. If they had only authority to sell the land, and to make an equal division among the children, they might be satisfied by regarding it merely as a *power in trust*, while the legal estate remained vested in the devisees. But the authority to sell and to divide among the children, together with the authority to lease, rent, insure, pay taxes, interest, and the like, showed conclusively that the legal estate was intended to vest in the executors. These powers lasted during the life of the widow; they could not be exercised unless the executors were clothed with the legal estate, they necessarily required that the executors should have full possession of the *corpus* of the property, with full power to manage it and to receive all the *gross* income, to pay all charges, and to pay only the net income to the widow and children. In

the legal estate is vested in the trustees, although the will contains no disposition by which the legal estate is in terms devised to them. The doctrine is settled that, in dispositions of such a nature, although there is no devise in terms to them, the authority conferred by the will upon the executors to lease, rent, repair, insure, pay taxes, assessments, and interest, and otherwise manage the trust property, and to pay over the *net* income to the devisees or legatees, necessarily carries the legal title to the executors, and creates an express active trust in them. It is a familiar doctrine that where land is conveyed or devised to trustees, and they have active duties to perform, they take the legal estate; the converse is also generally true, that where active duties are prescribed for executors, which could not be performed unless the legal estate is vested in them, they are in fact made trustees, and necessarily take the legal estate for the purposes of the trust.[1]

§ 1012. (2) **Provisions for Maintenance.**—A second species of trust by inference sometimes arises when property is given to a parent or person *in loco parentis*, with no trust declared in terms, but with such directions for the maintenance of his family or children as enable the court to infer an intention on the part of the donor that the property should be held in trust for the purposes of the maintenance. No definite rule can be laid down; each case must stand upon its own circumstances. If the language is sufficient for the intention to be clearly inferred, the trust will be enforced; otherwise the donee will take an absolute estate, and the provisions concerning maintenance

other words, the executors were trustees; the legal estate vested in them made them trustees. In support of these conclusions the court cited and commented upon Lewin on Trusts, 248; Barker v. Greenwood, 4 M. & W. 421; White v. Parker, 1 Bing. N. C. 573; Birmingham v. Kirwan, 2 Sch. & Lef. 444; Leggett v. Perkins, 2 N. Y. 297; Brewster v. Striker, 2 N. Y. 19. In conclusion, the court said: "These authorities are conceived to be abundant to establish the proposition that the authority to lease, rent, repair, insure, pay taxes, assessments, and interest, and pay net income to devisees, carried the legal title to the executors in this case, and created a trust in them valid under the statute." In Brewster v. Striker, 2 N. Y. 19, the testator devised his real estate to his grandchildren, and then provided that the lands should not be sold, but the executors should lease or rent them and pay the rents and profits to the grandchildren: the executors were held to be trustees and to take the legal estate. See, also, Garvey v. McDevitt, 72 N. Y. 556, 562; Smith v. Scholtz, 68 Id. 41; Knox v. Jones, 47 Id. 389, 396; Vernon v. Vernon, 53 Id. 351, 359; Van Nostrand v. Moore, 52 Id. 12, 18; Wagstaff v. Lowerre, 23 Barb. 209, 221; Ferry v. Liable, 31 N. J. Eq. 566 (a direction to the executors to carry on the testator's business creates a trust estate in them).

[1] In general: Wright v. Pearson, 1 Eden, 119, 125; Mott v. Buxton, 7 Ves. 201. To receive and pay over rents: Reynell v. Reynell, 10 Beav. 21; Collier v. McBean, 34 Id. 426; Silvester v. Wilson, 2 T. R. 444.

will be regarded as mere motives for the gift and recommendations addressed to his discretion.[1]

§ 1013. **(3) To Carry out the Purposes of the Will.**—Trusts, or at least powers in trust, are sometimes inferred from the terms of a will, when an intention to create the same is

[1] Woods v. Woods, 1 My. & Cr. 401; Raikes v. Ward, 1 Hare, 445; Carr v. Living, 28 Beav. 644; Bird v. Maybury, 33 Id. 351; Byne v. Blackburn, 26 Id. 41; Longmore v. Elcum, 2 Y. & C. Ch. 363, 369; Berry v. Briant, 2 Dr. & Sm. 1; Whiting v. Whiting, 4 Gray, 236, 240; Andrews v. B'k of Cape Ann, 3 Allen, 313; Smith v. Wildman, 39 Conn. 387; Paisley's Appeal, 70 Pa. St. 153, 158; Whelan v. Reilly, 3 W. Va. 597; Bryan v. Howland, 98 Ill. 625 (land conveyed to a trustee in trust for A., and to permit A. to "use, occupy, possess, enjoy, rent, etc., in any manner for the support, maintenance, and benefit of himself *and his children*," held not to create a trust in favor of the children); Taft v. Taft, 130 Mass. 461 (devise to a daughter with power to sell, and to devote the proceeds and income to the support and maintenance of herself *and her children*, no trust for the children); Smith v. Bowen, 35 N. Y. 83 ("all my estate I give to my wife, to be used and disposed of at her discretion for the benefit of herself and my daughters, A., B., and C.," created a trust for the daughters as to three fourths); Lyon v. Lyon, 65 N. Y. 339 (a testator devised all his real estate to his sons, provided that the house should be his daughter's "home free of expense, as to paying any rent or privilege in said house;" held, the daughter was entitled to full support from the sons); Biddle's Appeal, 80 Pa. St. 258 (devise to a trustee in trust for testator's widow to pay the income to her, and that income to be applied by her to the maintenance of his children, without her being called upon to give any account of her manner of applying it; held to create no trust for the children); Estate of Goodrich, 38 Wisc. 492 (testator devised his "home farm," etc., to his son, and added, "my wife to have a home and good support as long as she lives on the home premises, board and clothing," etc.; held, the maintenance of the widow was charged upon the "home farm"); Young v. Young, 68 N. C. 309 (testator gave all his property to his widow, "to be managed by her, and that she may be enabled the better to control and manage our children, to be disposed of by her to them in that manner she may think b est;" held a trust created for the chil dren); and see Parsons v. Best, 1 T. & C. 211. It would be difficult to reconcile some of these American decisions with the current of English authorities. The following is a résumé of recent English cases:

Where a bequest is made so that the legatee may use or dispose of the income for the benefit of *himself* and the maintenance or education of his children, a trust is in general created for the children in common with the interest of the parent. Woods v. Woods, 1 My. & Cr. 401; Berry v. Briant, 2 Dr. & Sm. 1; Castle v. Castle, 1 De G. & J. 352; Byne v. Blackburn, 26 Beav. 41; Carr v. Living, 28 Id. 644; Bird v. Maybury, 33 Id. 351; Hora v. Hora, Id. 88; Wilson v. Maddison, 2 Y. & C. Ch. 372; Longmore v. Elcum, Id. 363, 370; Staniland v. Staniland, 34 Beav. 536. Sometimes the language shows that it was not the testator's intention for the parent to take *any interest* for himself; *e. g.*, a gift to A. to dispose of among his children: Blakeney v. Blakeney, 6 Sim. 52; or a gift to A. to enable him to maintain his children until they become of age: Wetherell v. Wilson, 1 Keen, 80. A gift to A. to be disposed of for the benefit of *himself and his children*, has been construed so that the parent took a life estate with a *power* of disposition in favor of his children, which would be a power in trust. Armstrong v. Armstrong, L. R., 7 Eq. 518; Crockett v. Crockett, 2 Phill. 553; Costabadie v. Costabadie, 6 Hare, 410; Gully v. Cregoe, 24 Beav. 185; Jeffery v. De Vitre, Id. 276; Shovelton v. Shovelton, 32 Id. 143; but see Lambe v. Eames, L. R., 6 Ch. 597. As to a bequest to A. with a direction that B. should reside with and be maintained by A., see Wilson v. Bell, L. R., 4 Ch. 581. On the other hand, the language may show no intention to create a trust, and may simply state the motive for the gift. Thus the bequest was held to

necessary in order to carry out the directions and purposes of the testator. For example, when a trustee is ordered to pay certain moneys, but no property is given him with which to make the payments; or, when executors are ordered to sell the real estate, or the real estate is charged with the payment of the testator's debts; in these and similar cases a trust, or a power in trust, may be inferred in order that the trustee or executor may carry the directions into effect.[1]

§ 1014. **(4) Precatory Words.**—The most common and important species of trusts by inference are those which arise where a testator has given property to a devisee or legatee, and has accompanied his gift with *precatory* words or phrases, implying his desire or wish that the property should be used for the benefit of some designated person or persons, or should be applied to some designated purpose.[2] Words expressing

be absolute in the following cases: A bequest to A. to enable him the better to provide for his children: Brown v. Casamajor, 4 Ves. 498; a bequest to A. to enable him to assist his children: Benson v. Whittam, 5 Sim. 22; a legacy to A. to maintain and bring up B.: Biddles v. Biddles, 16 Sim. 1; Jones v. Greatwood, 16 Beav. 527; but see Wheeler v. Smith, 1 Giff. 300. It must be conceded that the cases upon the subject of maintenance are very confused and even contradictory.

[1] Pitt v. Pelham, 2 Freem. 134; 1 Chan. Rep. 283; Tenant v. Brown, 1 Chan. Cas. 180; Blatch v. Wilder, 1 Atk. 420; Cook v. Fountain, 3 Sw. 585; Hoxie v. Hoxie, 7 Paige, 187; Walker v. Whiting, 23 Pick. 313; Fay v. Taft, 12 Cush. 448; Watson v. Mayrant, 1 Rich. Eq. 449; Withers v. Yeadon, 1 Id. 324; Baker v. Red, 4 Dana, 158.

[2] In Knight v. Knight, 3 Beav. 148, 172–174; 11 Cl. & Fin. 513, Lord Langdale explained this doctrine in the following manner: "As a general rule, it has been laid down that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favor of another, the recommendation, or entreaty, or wish shall be held to create a trust: First, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain. In simple cases there is no difficulty in the application of the rule thus stated. If a testator gives £1000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum, or any certain part of it, to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish. So, if a testator gives the residue of his estate, after certain purposes are answered, to A. B., recommending A. B. after his death to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained and that the relations to be selected, though persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable—so capable of being made certain, that the rule is applicable to such cases. On the other hand, if the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained

direction, recommendation, entreaty, confidence, hope, expectation, desire, wish, request, and the like, are included under the denomination "precatory." As a most general statement with sufficient certainty; then it has been held that no trust has been created. Thus the words *free and unfettered* accompanying the strongest expressions of request, were held to prevent the words of request from being imperative. Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule; and in such cases we are told that the question 'never turns upon the grammatical import of the words—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered' (Meggison v. Moore, 2 Ves. 632, 633). And, 'wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended' (Morice v. Bishop of Durham, 10 Ves. 535, 536); or as Lord Eldon expresses it in another case: 'Where a trust is to be raised characterized by certainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the court to say it is not sufficiently clear what the testator intended' (Wright v. Atkyns, Turn. & R. 157, 159)." In this case a testator devised his estates to his heir at law—a brother—and added: "I trust to the liberality of my successors to reward any others of my old servants, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather:" *Held*, that no trust was created, the devisee took the estate absolutely unfettered by any trust in favor of the male line. One of the most recent decisions in which the subject was carefully considered, is Foose v. Whitmore, 82 N. Y. 405. Testator said: "I do give and bequeath all my property to my beloved wife, only requesting her at the close of her life to make such disposition of the same among my children and grandchildren, as shall seem to her good." Danforth, J., said (p. 406): "The tendency of modern decisions is not to extend the rule or practice which from words of doubtful meaning deduces or implies a trust (Lamb v. Eames, L. R., 10 Eq. 267; *In re* Hutchinson and Tenant, L. R., 8 Ch. D. 540). When this doctrine was applied, the object sought for was the intention of the testator, and for this the context of the will was looked at, first, to ascertain his wishes if any were expressed, and next whether he intended to impose an obligation on his legatee to carry them into effect; or having expressed his wishes, he intended to leave it to the legatee to act on them or not, at his discretion. Cases illustrating both divisions of this inquiry are collected by various text-writers. They are, however, subject to the rule stated by Lord Cranworth in Williams v. Williams, 1 Sim. N. S. 358, 368, that 'the real question always is whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.'" Mr. Justice Danforth then cites Bernard v. Minshull, Johns. 276; Howarth v. Dewell, 6 Jur. N. S. 1360; and *In re* Hutchinson and Tenant, *supra*, and reaches the conclusion that the words used were not sufficient to show an intention on the part of the testator to create any trust.

of the rule, if such words are strong enough to indicate the intention, and this intention is not defeated by other provisions of the will, the court infers that the property was given on trust for the person or object indicated, and will enforce such trust according to its nature, as a similar trust declared in express terms would be enforced.[1]

§ 1015. **Modern Tendency to Restrict the Doctrine.**—I shall not attempt any analysis and classification of the cases for the purpose of formulating more specific rules. This has been done, as far as practicable, in the various treatises upon trusts. The decisions are numerous and con-

[1] The following are some of the English cases showing what precatory words have or have not been held to create a trust. *Words which have been held sufficient:* "In full confidence," Le Marchant v. Le Marchant, L. R., 18 Eq. 414; Curnick v. Tucker, Id., 17 Eq. 320; "well knowing," Briggs v. Penny, 3 Macn. & G. 546; "directs," White v. Briggs, 2 Phil. 583; "confides," "trusts and confides," Palmer v. Simmonds, 2 Drew, 221, 225; Griffiths v. Evan, 5 Beav. 241; Macnab v. Whitbread, 17 Id. 299; "hopes," "doubts not," "recommends," Paul v. Compton, 8 Ves. 375, 380; Tibbits v. Tibbits, 19 Id. 656; Malim v. Keighley, 2 Ves. 333, 335; Hart v. Tribe, 18 Beav. 215; but see Meggison v. Moore, 2 Ves. 630; "entreats," Prevost v. Clarke, 2 Madd. 458; "desires," "wills and desires," Stead v. Mellor, L. R., 5 Ch. D. 225; Birch v. Wade, 3 V. & B. 198; Bonser v. Kinnear, 2 Giff. 195; "requests," "wishes and requests," Foley v. Parry, 2 My. & K. 138; Bernard v. Minshull, Johns. 276; "requires and entreats," Taylor v. George, 2 V. & B. 378; "I direct" that A. "shall reside with and be maintained by" B., Wilson v. Bell, L. R., 4 Ch. 581. Settlement made after marriage in pursuance of a declaration of wish, sustained, Teasdale v. Braithwaite, L. R., 5 Ch. D. 630; and see Irvine v. Sullivan, Id., 8 Eq. 673. *Words held not sufficient:* "My wish," Parnall v. Parnall, L. R., 9 Ch. D. 96; "to do justice" to testator's "relations," *In re* Bond, Id., 4 Ch. D. 238; "hoping," "fullest confidence," Eaton v. Watts, Id., 4 Eq. 151; proceeds to be applied in maintaining children; Mackett v. Mackett, Id., 14 Eq. 49; "may dispose of * * for the good of their families," Alexander v. Alexander, 6 De G. M. & G. 593; and generally where the intention appears from express terms, or from the whole disposition that the devisee or legatee is to take *absolutely*, the addition of precatory words, even though standing alone they might create a trust, will not cut down the absolute gift; their fulfillment is left to the donee's own discretion. Meredith v. Heneage, 1 Sim. 542; Wood v. Cox, 2 My. & Cr. 684; a gift "absolutely," to dispose of, etc., testator having "full confidence," etc., *In re* Hutchinson and Tenant, L. R., 8 Ch. D. 540; "to be at her disposal" "for the benefit of herself and family," Lambe v. Eames, Id., 10 Eq. 267; 6 Ch. 597; a gift to A. "for his own use, benefit, and disposal absolutely," nevertheless "conjuring," or "desiring," or "recommending" him to make some particular disposition, Winch v. Brutton, 14 Sim. 379; Johnston v. Rowlands, 2 De G. & Sm. 356; Webb v. Wools, 2 Sim. N. S. 267; Abraham v. Alman, 1 Russ. 509; Reeves v. Baker, 18 Beav. 372.

The following are among the most important English cases not mentioned in the foregoing abstract: Harding v. Glyn, 1 Atk. 469; Pierson v. Gafnet, 2 Bro. Ch. 38, 226; Harland v. Trigg, 1 Id. 142; Cunliffe v. Cunliffe, Ambl. 686; Bland v. Bland, 2 Cox, 349; Horwood v. West, 1 S. & S. 387; Cary v. Cary, 2 Sch. & Lef. 173, 189; Shaw v. Lawless, 1 Ll. & Go. 558; 5 Cl. & Fin. 129; Wright v. Atkyns, T. & R. 143, 157; 17 Ves. 255; 19 Id. 299; Cruwys v. Colman, 9 Ves. 319, 322; Morice v. B'p of Durham, 10 Id. 521, 535; Paul v. Compton, 8 Id. 375, 380; Knott v. Cottee, 2 Phil. 192; Hinxman v. Poynder, 5 Sim. 546; Sale v. Moore, 1 Id. 534; Eade v. Eade, 5 Madd. 118; Curtis v. Rippon, 5 Id. 434; Wood v. Cox, 1 Keen, 317.

flicting. Judges have for some time past shown a decided leaning against the doctrine of precatory trusts, and a strong tendency to restrict its operation within reasonable and somewhat narrow bounds; many of the earlier decisions would certainly not be followed at the present day. The courts of this country have generally adopted the doctrine substantially as settled in England, although perhaps with some caution and reserve, and they all exhibit the modern tendency to limit rather than enlarge its scope; while in a few of the states the doctrine has been accepted with great reluctance, and only to a partial extent, and in a modified form.[1]

§ 1016. **What Intention Necessary; The General Criterion.** — Whether or not a trust has been created in any particular case, is entirely a question of interpretation and construction. The intention must be sought for, not only in the precatory words themselves, but also in the terms and qualifications of the gift, the powers of disposition or enjoyment conferred upon the first taker, the nature of the property, the description of the supposed beneficiaries, and all the other context. Precatory words may be used which standing alone would, under the decisions, create a trust; but they may be qualified and controlled by other expressions showing that the gift is absolute, and that everything is left to the discretion of the devisee or legatee. Each case must, therefore, turn upon its own circumstances, and not a little upon the sentiments and prepossessions of individual judges. With respect to the essential

[1] Dresser v. Dresser, 46 Me. 48; Cole v. Littlefield, 35 Id. 439; Erickson v. Willard, 1 N. H. 217; Van Amee v. Jackson, 35 Vt. 173; Warner v. Bates, 98 Mass. 274, 277; Spooner v. Lovejoy, 108 Id. 529, 533; Chase v. Chase, 2 Allen, 101; Homer v. Shelton, 2 Met. 194, 206; Whipple v. Adams, 1 Id. 444; Foose v. Whitmore, 82 N. Y. 405; Smith v. Bowen, 35 Id. 83; Dominick v. Sayre, 3 Sandf. 555; Parsons v. Best, 1 T. & C. 211; Arcularius v. Geisenhainer, 3 Bradf. 64, 75; Van Duyne v. Van Duyne, 1 McCart. 397; Ward v. Peloubet, 2 Stockt. Ch. 304; Williams v. Worthington, 49 Md. 572; Tolson v. Tolson, 10 Gill & J. 159; Harrisons v. Harrison's Adm'x, 2 Gratt. 1; Crump v. Redd's Adm'r, 6 Id. 372; Reid's Adm'r v. Blackstone, 14 Id. 363; Rhett v. Mason's Ex'r, 18 Id. 541; Cook v. Ellington, 6 Jones Eq. 371; Carson, v. Carson, 1 Ired. Eq. 329; Young v. Young, 68 N. C. 309; Lesesne v. Witte, 5 S. C. 450; Hunter v. Stembridge, 12 Ga. 192; Ingram v. Fraley, 29 Id. 553; Lines v. Darden, 5 Flor. 51; McRee's Adm'rs v. Means, 34 Ala. 349; Ellis v. Ellis's Adm'rs, 15 Id 296; Lucas v. Lockhart, 10 Sm. & Mar. 466; Cockrill v. Armstrong, 31 Ark. 580; Collins v. Carlisle, 7 B. Mon. 13; Hunt v. Hunt, 11 Nev. 442. In Connecticut and Pennsylvania the doctrine has been accepted with great reserve and caution and under considerable limitations. See Harper v. Phelps, 21 Conn. 257; Gilbert v. Chapin, 19 Id. 342; Bull v. Bull, 8 Id. 47; Coates' Appeal, 2 Barr. 129; Pennock's Estate, 20 Pa. St. 268; Walker v. Hall, 34 Id. 483; Kinter v. Jenks, 43 Id. 445; Jauretche v. Proctor, 48 Id. 466; Second Church v. Disbrow, 52 Id. 219; Burt v. Herron, 66 Id. 400; Paisley's Appeal, 70 Id. 153; Biddle's Appeal, 80 Id. 258.

elements which must exist in every precatory trust, it is impossible to add anything to the clear and accurate statement of Lord Langdale, in the case of Knight v. Knight, already quoted. Those essentials are the imperative nature and meaning of the precatory words, the certainty of the subject-matter or property embraced in the trust, and the certainty of the objects or intended beneficiaries. Upon the authority of the more modern decisions, the whole doctrine may be summed up in a single proposition: In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, *that the testator's intention to create an express trust was as full, complete, settled, and sure, as though he had given the property to hold upon a trust declared in express terms in the ordinary manner.* Unless a gift to A., with precatory words in favor of B., is in fact *equivalent in its meaning, intention, and effect* to a gift to A. "in trust for B.," then certainly no trust should be inferred. The early decisions proceeded perhaps upon a more artificial rule, and saw an intention in the use of words of wish, desire, and the like, where no such intention really existed. The modern decisions have adopted a more just and reasonable rule, and require the intention to exist as a fact, and to be expressed in unequivocal language. No other conclusion can be reconciled with the general principles of construction which are based upon reason and universal experience.[1] It has sometimes

[1] The following cases are given more as examples of the essential requisites, and as illustrations of the conclusion reached in the text. *Imperative nature of the words.*—Stead v. Mellor, L. R., 5 Ch. D. 225. The opinion of Jessel, M. R., in this case shows very clearly the positions occupied by modern authorities, and fully sustains the correctness of the criterion laid down above in the text. The will gave the residue to A. and B., "my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." Held that A. and B. took the residue absolutely. Sir Geo. Jessel said among other things (p. 228): "Unless I find in the will something *equivalent to a declaration that the residuary legatees take as trustees*, I must hold that they take a beneficial interest." Briggs v. Penny, 3 Macn. & G. 546, 554, 556, *per* Lord Truro; Williams v. Williams, 1 Sim., N. S., 358, 368; Meredith v. Heneage, 1 Sim. 542, 550, 553; Bardswell v. Bardswell, 9 Id. 319; Knott v. Cottee, 2 Phil. 192; Lechmere v. Lavie, 2 My. & K. 197; Hood v. Oglander, 34 Beav. 513; Scott v. Key, 35 Id. 291; Shovelton v. Shovelton, 32 Id. 143; Liddard v. Liddard, 28 Id. 266; Eaton v. Watts, L. R., 4 Eq. 151; Foose v. Whitmore, 82 N. Y. 405; Cockrill v. Armstrong, 31 Ark. 580; Hunt v. Hunt, 11 Nev. 442; Biddle's Appeal, 80 Pa. St. 258; Van Amee v. Jackson, 35 Vt. 173, 177. *Certainty of subject-matter or property.* Buggins v. Yates, 9 Mod. 122; Curtis v. Rippon, 5 Madd. 434; Pope v. Pope, 10 Sim. 1; Bardswell v. Bardswell, 9 Id. 319; Winch v. Brutton, 14 Id. 379; Cowman v. Harrison, 10 Hare, 234; Russell v. Jackson, Id. 204, 213; Lechmere v. Lavie, 2 My. & K. 197; Palmer v. Simmonds, 2 Drew. 221; Fox v. Fox, 27 Beav. 301; Constable v. Bull, 3 De G. & Sm. 411; Williams v. Worthington, 49 Md. 572; Tolson v. Tolson, 10 Gill & J. 159; Ingram v. Fraley, 29 Ga. 553. *Certainty of ob-*

been stated as a general rule, that a *prima facie* presumption of an intention to create a trust, arises from the use of precatory words. Whatever may have been true of the earlier cases, the modern authorities do not, in my opinion, sustain any such rule; it is contrary to their whole scope and tenor.

§ 1017. **Objections to the Doctrine.**—The doctrine of precatory trusts has never met with unanimous approval. Able judges have dissented from it on principle; have pronounced it artificial, and have described it as violating instead of carrying out the intent of parties; and undoubtedly most of the earlier decisions were open to this criticism. It does seem strange that a testator, *having a full and settled intention to create a trust*, should adopt a mode which at best seems to be a mere suggestion or possible inference, and should not employ the familiar method of creating a trust by express declaration.[1] On the other hand, to abrogate the doctrine altogether, would be introducing a rule wholly arbitrary and technical, since it would be saying in fact that trusts shall not be created except by means of a certain, fixed, and technical formula or manner of

ject, the persons, and the way in which the property is to go.—Green v. Marsden, 1 Drew. 646; White v. Briggs, 2 Phil. 583; Sale v. Moore, 1 Sim. 534; Malim v. Keighley, 2 Ves. 333, 335; Briggs v. Penny, 3 Macn. & G. 546. With respect to the doctrine in all of its phases, see Harding v. Glyn, 1 Atk. 469; 2 Eq. Lead. Cas. 1833, 1834–1848, 1857 1866 (4th Am. ed.)

Notwithstanding the imposing line of authorities, there has always been a strong dissent from the doctrine from judges of the highest ability, who have described it as artificial, and its effect as violating the intention of parties. The following are a few examples: In Sale v. Moore, 1 Sim. 534, 540, Sir Anthony Hart, V. C., said: "The first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them." In Wright v. Atkyns, 1 V. & B. 313, 315, Lord Eldon said: "This sort of trust is generally a surprise on the intention, but it is too late to correct that." In the important case of Meredith v. Heneage, 1 Sim. 542, 551, before the House of Lords, Ch. Baron Richards said, speaking of prior decisions: "I entertain a strong doubt whether, in many or perhaps in most of the cases, the construction was not adverse to the real intention of the testator. It seems to me very singular that a person who really meant to impose the obligation established by the cases, should use a course so circuitous, and a language so inappropriate and obscure, to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself, and to the professional or other person who might prepare his will. In considering these cases it has always occurred to me that, if I had myself made such a will as has generally been considered imperative, I should never have intended it to be imperative; but on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer those whom I proposed to him, and who, next to him, were at the time the principal objects of my regard." He also says that the question in such cases "is purely a matter of intention, to be collected from the words of the instrument, as in all other cases of wills." The foregoing language of this learned judge should, as it seems to me, be present to the minds of all courts when passing upon cases of precatory trusts, as a proper and reasonable guide in rendering a decision.

[1] See quotations in the latter portion of the last preceding note.

expression. Justice will be done, therefore, if the doctrine is placed upon reasonable grounds, its operation confined within narrow limits, and regulated by the criterion stated in the preceding paragraph.

SECTION IV.

PUBLIC OR CHARITABLE TRUSTS.

ANALYSIS.

§ 1018. General description.
§ 1019. A public not a private benefaction requisite.
§ 1020. What are charitable uses and purposes: "Statute of charitable uses."
§§ 1021–1024. Classes of charitable uses.
§ 1021. (1) Religious purposes.
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§ 1025. Creation of the trust: certainty or uncertainty of the object and of the beneficiaries.
§ 1026. Certainty or uncertainty of the trustees.
§ 1027. The doctrine of *cy pres*.
§ 1028. Origin and extent of the equitable jurisdiction.
§ 1029. Charitable trusts in the United States.

§ 1018. **General Description.**—In express private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified *cestui que trust* clearly identified or made capable of identification by the terms of the instrument creating the trust. It is an essential feature of public or charitable trusts that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual numbers, and partaking of a *quasi* public character. The most patent examples are "the poor" of a certain district in a trust of a benevolent nature, or "the children" of a certain town in a trust for educational purposes. In such a case it is evident that *all* the beneficiaries can never unite to enforce the trust; for even if all those in existence at any given time could unite, they could not include, nor bind their successors. It is a settled doctrine in England, and in many of the American states, that personal property, and real property except when prohibited by statutes, may be conveyed or bequeathed in trust upon charitable uses and purposes for the benefit of such uncertain classes or portions of the public, and that if the purposes are charitable, within the meaning

given to that term, a court of equity will enforce the trust. Furthermore, it is one of the most important and distinctive features of charitable trusts, that however long the period may be during which they are to last, even though it be absolutely unlimited in its duration, they are not subject to nor controlled by the established doctrines nor even the statutes which prohibit perpetuities. Indeed it may be said that the full conception of a charitable trust includes the notion that it is or may be perpetual.[1]

§ 1019. **A Public and not Private Benefaction Requisite.**—In order that a trust may be charitable, the gift must be for the benefit of such an indefinite *class* of persons, that the charity is really a public and not a mere private benefaction. On the other hand, in a public trust the designation of the charitable use and of the beneficiaries must be sufficiently certain and descriptive to indicate the intention of the donor; the language must not be so general and vague as to leave *both the beneficiaries and the purposes and objects* completely to the judgment and choice of the trustee or of the court.[2]

[1] The subject of charitable trusts in particular is so broad, and involves so many special rules and applications, that I shall attempt no more than to give an outline of its more general doctrines, and must refer the reader to treatises upon trusts for a detailed exposition; a proper treatment would require a volume by itself.

[2] Morice v. B'p of Durham, 9 Ves. 399, 405; 10 Id. 522, 541; Mitford v. Reynolds, 1 Phil. 185; Att'y-Gen. v. Aspinall, 2 My. & Cr. 613, 622, 623; British Museum v. White, 2 S. & S. 594, 596; Nash v. Morley, 5 Beav. 177; Kendall v. Granger, Id. 300; Townsend v. Carus, 3 Hare, 257; Nightingale v. Goulburn, 5 Id. 484; Whicker v. Hume, 14 Beav. 509; 1 De G. M. & G. 506; 7 H. L. Cas. 124; Miller v. Rowan, 5 Cl. & Fin. 99; Williams v. Kershaw, Id. 111 (n.); Cocks v. Manners, L. R., 12 Eq. 574; Beaumont v. Oliveira, Id., 6 Id. 534; 4 Ch. 309, 314 (scientific purposes); President of the U. S. v. Drummond, cited 7 H. L. Cas. 155; Dolan v. Macdermot, L. R., 5 Eq. 60; 3 Ch. 676 (for "such charities and other public purposes as lawfully might be in the parish of T.," a good charitable trust); James v. Allen, 3 Meriv. 17; Fowler v. Garlike, 1 Russ. & M. 232; Vezey v. Jamson, 1 S. & S. 69; Ellis v. Selby, 7 Sim. 352; 1 My. & Cr. 286; Loscombe v. Wintringham, 13 Beav. 87, 89, and cases in note; Baker v. Sutton, 1 Keen, 224; Wilkinson v. Lindgreen, L. R., 5 Ch. 570 ("to any other religious institution or purposes as A. and B. may think proper"—a valid charity); Chamberlayne v. Brockett, Id., 8 Id. 206; Aston v. Wood, Id., 6 Eq. 419 (court will not presume a public charitable use where none was declared, although the bequest was to the trustees of a religious society); Corp'n of Gloucester v. Wood, 3 Hare, 131, 136–148; Lewis v. Allenby, L. R., 10 Eq. 668; Wilkinson v. Barber, Id., 14 Id. 96; Gillam v. Taylor, Id., 16 Id. 581; Att'y-Gen. v. Eastlake, 11 Hare, 205, 215; Pocock v. Att'y-Gen., L. R., 3 Ch. D. 342; *In re* Jarman's Estate, Id., 8 Id. 584; *In re* Williams, Id., 5 Id. 735; *In re* Birkett, Id., 9 Id. 576; *In re* Hedgman, Id., 8 Id. 156; Mills v. Farmer, 1 Meriv. 55; Moggridge v. Thackwell, 7 Ves. 36; Coggeshall v. Pelton, 7 Johns. Ch. 292; Salstonstall v. Sanders. 11 Allen, 446; Jackson v. Phillips, 14 Id. 539; American Academy v. Harvard College, 12 Gray, 582; Vidal v. Girard, 2 How. (U. S.) 127; Cresson's Appeal, 30 Pa. St. 437; Price v. Maxwell, 28 Id. 23, 35; Franklin v. Armfield, 2 Sneed, 305; Russell v. Allen, 5 Dillon, 235; Boxford Sec. Relig. Soc. v. Harriman, 125 Mass. 321; Ould v. Washington

§ 1020. **What are Charitable Uses and Purposes; "Statute of Charitable Uses."**—It is the question of primary importance, upon which all others depend, to determine what uses and purposes are charitable, within the meaning of the doctrine, so that gifts for such purposes may be sustained as valid charitable trusts, although they may tend to create perpetuities. It has already been shown that the purpose, whatever be its particular object, must benefit some indefinite class or portion of the *public*, for mere private charities are governed by the rules which apply to ordinary private express trusts. The general objects which come within the description of "charitable uses," and which may therefore constitute a valid charitable trust, were enumerated in the "statute of charitable uses," passed in the reign of Queen Elizabeth,[1] as follows:

Hospital, 5 Otto, 303; Goodell v. Union Ass'n of Burlington Co., 29 N. J. Eq. 32; De Camp v. Dobbins, Id. 36; Trustees of Cory Univ. Soc. v. Beatty, 28 Id. 570; Stevens v. Shippen, Id. 487; Clement v. Hyde, 50 Vt. 716; Craig v. Secrist, 54 Ind. 419; Mason v. Meth. Epis. Ch., 27 N. J. Eq. 47; Cruse v. Axtell, 50 Ind. 49; Old South Soc. v. Crocker, 119 Mass. 1; Zeisweiss v. James, 63 Pa. St. 465 (a devise to "the Infidel Society in Philadelphia for the purpose of building a hall for the free discussion of religion, politics, etc.," is not a valid charitable use); Meeting St. Bap. Soc. v. Hail, 8 R. I. 234; Needles v. Martin, 33 Md. 609; Thompson's Ex'rs v. Norris, 29 N. J. Eq. 489; Norris v. Thompson's Ex'rs, 19 Id. 307; Power v. Cassidy, 79 N. Y. 602.

In Jackson v. Phillips, 14 Allen, 539, 556, Gray, J., said: "A charity is a gift to be applied, consistently with existing laws, *for the benefit of an indefinite number of persons*, either by bringing their minds or hearts under the influence of education or religion; by relieving their bodies from disease, suffering, or constraint; by assisting them to establish themselves in life; or by erecting or maintaining public works; or otherwise lessening the burdens of government." This may not be an exhaustive description of charitable purposes; but it accurately states the essential element that the gift must be for an *indefinite class*, so that the benefit conferred upon them is in its nature public.

Trusts for private objects do not fall within the denomination of charitable trusts nor under the jurisdiction over them, and are void if they create perpetuities; as those for the erection or repair of private tombs or monuments. *In re* Rickard, 31 Beav. 244; Fowler v. Fowler, 33 Id. 616; Hoare v. Osborne, L. R., 1 Eq. 585. Or to found a private museum. Thompson v. Shakespear, 1 De G. F. & J. 399. Or for the benefit of a private company. Att'y-Gen. v. Haberdashers Co., 1 My. & K. 420. Or for a private charity. Ommaney v. Butcher, T. & R. 260. A "friendly society." *In re* Clark's Trust, L. R., 1 Ch. Div. 497; Dawson v. Small, Id., 18 Eq. 114 (to repair tomb); Thomas v. Howell, Id., Id. 198 (a bequest to each of ten poor clergymen); *In re* Williams, Id., 5 Ch. D. 735 (to repair tombs); Carne v. Long, 2 De G. F. & J. 75 (to support a library society which was established for the benefit of its own subscribers only); *per contra*, Cruse v. Axtell, 50 Ind. 49 (a devise to a lodge of Freemasons, held to be for a good charitable use; a decision which seems opposed to the authorities); Att'y-Gen. v. Soule, 28 Mich. 153 (a bequest to establish an ordinary private school, is not for a public charitable use); Swift v. Beneficial Soc., 73 Pa. St. 362 (bequest to a "friendly society" the benefits of which are confined to its own members, is not for a charitable use); *In re* Clark's trust, L. R., 1 Ch. D. 497 (same as last).

[1] 43 Eliz. ch. 4. The "charitable trusts" now under consideration, should be carefully distinguished from gifts to corporations which are authorized by their charters, or other statutes, to receive and hold property.

"The relief of aged, impotent, and poor people, the maintenance of maimed and sick soldiers and mariners; the support of schools of learning, free schools, and scholars of universities; repairs of bridges, ports, havens, causeways, churches, sea banks, and highways; education and preferment of orphans; the relief, stock, and maintenance of houses of correction; marriage of poor maids; aid and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners and captives; aid of poor inhabitants concerning payments of fifteenths, setting out of soldiers, and other taxes." It will be seen that this list omits some most important and familiar charitable objects—as for example, the support and propagation of religion. The English and American courts have never regarded this enumeration as exhaustive, but as designed to be merely illustrative. Numerous objects, analogous to those mentioned in the statute, are held to be charitable. The doctrine is settled that all particular objects, embraced within the general spirit, intent, and scope of the statute, are to be considered as charitable, unless they violate some rule of public policy, or the provisions of some positive statute.[1]

§1021. **Classes of Charitable Uses; (1) Religious Purposes.**—In addition to the objects specifically enumerated in the statute, other purposes of a like general nature are held by the courts to be charitable; and these may all be arranged in the following classes: *Religious Purposes.*—The support and propagation of religion is clearly a "charitable use."[2] This in-

and apply it to objects which fall within the general designation of charitable. Such gifts are permitted in the states where the peculiar doctrine of "charitable trusts" has been abrogated, and they are regulated by the general rules of law applicable to all corporations, or by the provisions of the individual charter. See Levy v. Levy, 33 N. Y. 97, 112–118, *per* Wright, J.; Bascom v. Albertson, 34 Id. 584, 587–621, *per* Porter J.; Wetmore v. Parker, 52 Id. 450; Dodge v. Williams, 46 Wisc. 70; Gould v. Taylor Orphan Asylum, 46 Id. 106.

[1] Many gifts for purposes confessedly charitable are defeated by the statutes of mortmain in England, and in the states where these or analogous statutes have been adopted.

[2] In England an exception is made of "superstitious" uses, contrary to the public policy, such as masses for the soul. Att'y-Gen. v. Fishmongers' Co., 5 My. & Cr. 11; West v. Shuttleworth, 2 My. & K. 684; *In re* Blundell, 30 Beav. 360; Heath v. Chapman, 2 Drew. 417; Cary v. Abbot, 7 Ves. 490, 495. In the United States no such purposes would probably be regarded as superstitious, which were recognized by any religious belief and ritual. Gass v. Wilhite, 2 Dana, 170; Methodist Ch. v. Remington, 1 Watts, 218. In England, no charity for a *religious* purpose could be upheld as a valid *public* charity, unless the form of religion was one at least professing to acknowledge the divine revelation contained in the Bible, and to be founded thereon; indeed, the whole doctrine was regarded by the early judges, as carrying out the precepts of Christianity. While the American courts do not discriminate between different phases of religious belief and doctrine, still the *essential element* of a charity for a religious purpose *must be in reality religious.* The supreme court of Pennsylvania there-

cludes gifts for the erection, maintenance, and repair of church edifices, the maintenance of worship, the support of clergymen, the promotion and propagation of religious doctrines and beliefs in any manner by the church or by associations, the aid of missionary, bible, and other religious societies, and all other objects and purposes which are really religious. The English courts made an exception with reference to superstitious uses, but in the United States no such distinction is made. Our courts would recognize no difference among religious beliefs and opinions; but in this country, as well as in England, a gift could not be sustained as a charity for religious purposes when

fore decided in complete agreement with principle and authority, that a devise to the "Infidel Society in Philadelphia for the purpose of building a hall for the free discussion of religion, politics, etc.," was not a valid charitable gift. Zeisweiss v. James, 63 Pa. St. 465. In England it is not necessary that the objects should conform to the doctrines and modes of the established church. Charitable gifts are valid for *dissenters*. Att'y-Gen. v. Cock, 2 Ves. Sen. 273; Shrewsbury v. Hornby, 5 Hare, 406; Att'y-Gen. v. Lawes, 8 Id. 32; Att'y-Gen. v. Bunce, L. R., 6 Eq. 563. *Roman Catholics.*—Cary v. Abbot, 7 Ves. 490; Att'y-Gen. v. Todd, 1 Keen, 803; Walsh v. Gladstone, 1 Phil. 290; Cocks v. Manners, L. R., 12 Eq. 574. *Jews.*—Michel's Trust, 28 Beav. 39. To promulgate doctrines of Joanna Southcott, Thornton v. Howe, 8 Jur. N. S. 663. But not to promote infidelity. Zeisweiss v. James, 63 Pa. St. 465.

Among the particular objects which constitute valid religious purposes, are the following: Building, repairing, ornamenting, etc., churches, Hoare v. Osborne, L. R., 1 Eq. 585; Booth v. Carter, Id., 3 Eq. 757; Cresswell v. Cresswell, Id., 6 Eq. 69 (to build a parsonage); providing things connected with church services, Turner v. Ogden, 1 Cox, 316; Adnam v. Cole, 6 Beav. 353; maintenance of divine worship, Att'y-Gen. v. Pearson, 3 Meriv. 353, 409; Att'y-Gen. v. Bunce, L. R., 6 Eq. 563; Att'y-Gen. v. Webster, Id., 20 Eq. 483; providing or supporting clergymen in the performance of their religious functions, Att'y-Gen. v. Lawes, 8 Hare, 32; Thornber v. Wilson, 3 Drew. 245; 4 Id. 350; *In re* Maguire L. R., 9 Eq. 632; *In re* Clergy Soc., 2 K. & J. 615; *In re* Kilvert's Trusts, L. R., 12 Eq. 183; 7 Ch. 170; but a bequest to each of ten poor clergymen, is not a "charitable gift," Thomas v. Howell, L. R., 18 Eq. 198; and see Russell v. Kellett, 3 Sm. & Giff. 264; promoting religious doctrines and beliefs by the distribution of bibles or tracts, and by means of religious socities, etc.; Att'y-Gen. v. Stepney, 10 Ves. 22; Wilkinson v. Lindgren, L. R., 5 Ch. 570; a gift to "sisters of charity," but not to a convent, Cocks v. Manners, Id., 12 Eq. 574..

American decisions are to the same effect: Building and supporting churches, maintaining divine worship, Jones v. Habersham, 3 Woods, 443; Laird v. Bass, 50 Tex. 412; De Camp v. Dobbins, 29 N. J. Eq. 36; Old South Soc. v. Crocker, 119 Mass. 1; Meeting St. Bap. Soc. v. Hail, 8 R. I. 234; promulgation of religious doctrines and beliefs and practices, missionary and other similar societies, Goodell v. Union Ass'n etc., 29 N. J. Eq. 32 (Young Men's Christian Association); De Camp v. Dobbins, Id. 36 (missionary); Trustees of Cory Univ. Soc. v. Beatty, 28 Id. Eq. 570 ("promotion of the Universalist denomination"); but Starkweather v. Am. Bible Soc., 72 Ill. 50, holds that the American Bible Society is *not* a charity within the statute of Elizabeth; Fairbanks v. Lamson, 99 Mass. 533; Maine Baptist Miss. Con. v. Portland, 65 Me. 92 (domestic missions, diffusion of Christian knowledge); for the benefit of the Sunday-school library of a specified church, Fairbanks v. Lamson, *supra;* but a bequest to a certain Sunday school, the income to be applied in procuring Christmas presents for the scholars, was held invalid. Goodell v. Union Ass'n, etc., 29 N. J. Eq. 32.

it was wholly irreligious, and its only object was to destroy all religion.

§ 1022. **(2) Benevolent Purposes.**—Numerous trusts for purposes of benevolence are upheld as charitable, although not mentioned in the statute, since they are within its spirit and intent.[1] Among the particular instances embraced within this class, are trusts for the "poor," the "deserving poor," widows and orphans of a specified town, district, or country; for hospitals, asylums, and similar public institutions; for any class of persons requiring aid, as "the colored persons" of a certain state; and benevolent objects generally, without specifying the

[1] As examples, to support or aid widows, or orphans, or the poor of a certain place or district. Powell v. Att'y-Gen. 3 Meriv. 48; Att'y-Gen. v. Comber, 2 S. & S. 93; Att'y-Gen. v. Clarke, Ambl. 422; B'p of Hereford v. Adams, 7 Ves. 324; Russell v. Kellett, 3 Sm. & Giff. 264; Thompson v. Corby, 27 Beav. 649; Fisk v. Att'y-Gen., L. R., 4 Eq. 521; Dawson v. Small, L. R., 18 Eq. 114; *In re* Williams, L. R., 5 Ch. D. 735; *In re* Birkett, L. R., 9 Ch. D. 576; it also seems to be settled that a gift or bequest in trust for the donor's or testator's "poor relations," or "poor descendants," or "poor kinsmen and their offspring and issue," as an indefinite class, is a good charitable trust for benevolent purposes. Gillam v. Taylor, L. R., 16 Eq. 581, 584; Att'y-Gen. v. Price, 17 Ves. 371; Isaac v. Defriez, Ambl. 595; 17 Ves. 373, n.; White v. White, 7 Ves. 423; Bernal v. Bernal, 3 My. & Cr. 559; Att'y-Gen. v. Duke of Northumberland, L. R., 7 Ch. D. 745; but a gift to particular individual poor relations would be an ordinary trust or legacy. Liley v. Hey, 1 Hare, 580. For erecting, endowing, or supporting hospitals. Pelham v. Anderson, 2 Eden, 295; Magistrates of Dundee v. Morris, 3 Macq. 134, 157; Perring v. Trail, L. R., 18 Eq. 88; Univ. of London v. Yarrow, 1 De G. & J. 72 (to found a hospital "for studying and curing maladies of any quadruped or bird useful to man"); for deserving unsuccessful literary men: Thompson v. Thompson, 1 Coll. 381, 395; for the encouragement of good servants: Loscombe v. Wintringham, 13 Beav. 87; for releasing debtors: Att'y-Gen. v. Painter's Co, 2 Cox, 51; for the redemption of captives or prisoners: Att'y-Gen. v. Ironmongers' Co., 2 My. & K. 576; *In re* Prison Charities, L. R., 16 Eq. 129; but see Thrupp v. Collett, 26 Beav. 125; for general benevolent purposes in a specified district or country at large, without mentioning any particular form or object: Dolan v. Macdermot, L. R., 5 Eq. 60; 3 Ch. 676; Cresswell v. Cresswell, Id., 6 Eq. 69; Lewis v. Allenby, Id., 10 Eq. 668; Wilkinson v. Barber, Id., 14 Eq. 96; Att'y-Gen. v. Webster, Id., 20 Eq. 483; Pocock v. Att'y-Gen. Id., 3 Ch. D. 342; Mills v. Farmer, 1 Meriv. 55; Moggridge v. Thackwell, 7 Ves. 36; but in *In re* Jarman's Estate, L. R., 8 Ch. D. 584, a bequest to general benevolent purposes was held invalid from the uncertainty and indefiniteness of its object.

American decisions: Aid or support of the poor, widows, orphans, etc.: Sohier v. Burr, 127 Mass. 221; Goodell v. Union Ass'n etc., 29 N. J. Eq. 32 ("in aid of the deserving poor of M."); Mason v. Meth. Epis. Ch., 27 N. J. Eq. 47; Fellows v. Miner, 119 Mass. 541 (aged and infirm poor); Gooch v. Ass'n for Relief etc., 109 Mass. 558 (a society "for the support of poor old women"); for building or sustaining a hospital: Ould v. Washington Hospital, 5 Otto, 303; McDonald v. Mass. Gen. Hospital, 120 Mass. 432; devise to a lodge of free masons: Cruse v. Axtell, 50 Ind. 49; but a "beneficial society," the benefits of which are confined to its own members, is not a public charity: Swift v. Beneficial Soc., 73 Pa. St. 362; for general benevolent purposes, not specified: De Camp v. Dobbins, 29 N. J. Eq. 36; Mayer v. Soc. for Visitation of the Sick, 2 Brews. 385; Thomson's Ex'rs v. Norris, 20 N. J. Eq. 489 (a bequest to "benevolent, religious, or charitable institutions," held not a good charitable use, "benevolent" includes objects not charitable).

form. Even trusts established for the donor's own "poor relations," or "poor descendants," as a class, are held to be true charities. The beneficiaries to be relieved, and the mode proposed for aiding them, must be *public;* a trust on behalf of a strictly private association, the benefits of which are confined to its own members, is not a "charitable trust."

§ 1023. **(3) Educational Purposes.**—Gifts, devises, and bequests in trust for educational purposes are valid since they are all clearly within the spirit of the statute.[1] This class embraces all trusts for the founding, endowing, and supporting schools and other similar institutions which are not strictly private; for the establishment of professorships, and maintenance of teachers; for the education of designated classes of persons, as the poor children of a town; for the promotion of science and scientific studies; and generally for the advancement of knowledge, learning, and education.

§ 1024. **(4) Other Public Purposes.**—Other public purposes, not in the ordinary sense *benevolent*, may be valid

[1] Examples: To found, endow, or maintain schools and other institutions of learning, which are not strictly private: Magistrates of Dundee v. Morris, 3 Macq. 134; *In re* Latymer's Charity, L. R., 7 Eq. 353; *In re* Hedgman, Id., 8 Ch. D. 156 ("for supporting or founding free or ragged schools"); and see New v. Bonaker, L. R., 4 Eq. 655; for the foundation or endowment of professorships, scholarships, lectureships, etc., and maintenance of teachers: Rex v. Newman, 1 Lev. 284; Att'y-Gen. v. Margaret Prof., 1 Vern. 55; Att'y-Gen. v. Tancred, 1 Eden, 10; for the advancement of education, learning, and knowledge, generally: Whicker v. Hume, 7 H. L. Cas. 124; 1 De G. M. & G. 506; also for the promotion of science, and any strictly scientific purposes: President of U. S. v. Drummond, cited 7 H. L. Cas. 155; as a gift to the Royal Society and to the Geographical Society: Beaumont v. Oliveira, L. R., 6 Eq. 534; 4 Ch. 309; and for a botanical garden: Trustees of the Br. Museum v. White, 2 S. & S. 594; Townley v. Bedwell, 6 Ves. 194. American cases: Founding or supporting schools, etc.—in several of those cases the gift is to a town or other municipal body, as the trustee: Russell v. Allen, 5 Dillon, 235; Boxford etc. Soc. v. Harriman, 125 Mass. 321; Stevens v. Shippen, 28 N. J. Eq. 487; Meeting St. Bap. Soc. v. Hail, 8 R. I. 234; but the school must be public or for the benefit of some portion of the public; a gift of $10,000 to trustees "for the establishment of a school at M. for the education of children," was held not a valid charity, since the school might be merely private: Att'y-Gen. v. Soule, 28 Mich. 153; the same is true of a gift for a merely private library association: Carne v. Long, 2 De G. F. & J. 75; gifts for the promotion of education generally, or for the education of any designated class of persons in a town, or district, or state: Att'y-Gen. v. Parker, 126 Mass. 216; Dodge v. Williams, 46 Wisc. 70 ("for the education and tuition of worthy indigent females"); De Camp v. Dobbins, 29 N. J. Eq. 36 ("educational enterprises"); Clement v. Hyde, 50 Vt. 716 (bequest "to the treasurer of the county of O. and his successors in office, the income to be expended in the education of scholars of the poor in the Co. of O."); Craig v. Secrist, 54 Ind. 419 (devise to a county for the education of a certain class of children); Mason v. Meth. Epis. Ch., 27 N. J. Eq. 47 (bequest to two towns, the income for educating poor children); Birchard v. Scott, 39 Conn. 63 (to defray expenses of educating poor children in a certain district).

charities, since they are either expressly mentioned by the statute, or are within its plain intent. All of these purposes tend to benefit the public either of the entire country, or of some particular district; or to lighten the public burdens for defraying the necessary expenses of local administration, which rest upon the inhabitants of a designated region.[1]

§ 1025. **Creation of the Trust: Certainty or Uncertainty of the Object and of the Beneficiaries.**—One of the distinguishing elements of a "charitable" as compared with an ordinary trust, consists in the generality, indefiniteness, and even uncertainty which is permitted in describing the objects and purposes, or the beneficiaries. From the very definition of a "charitable trust" the beneficiaries are always an uncertain body or class; but the doctrine goes further than this. If the donor sufficiently shows his intention to create a charity, and indicates its general nature and purpose, and describes in general terms the class of beneficiaries, the trust will be sustained and enforced, although there may be indefiniteness in the declaration and description, and although much may be left to the discretion of the trustees.[2] This uncertainty, however, must not

[1] Examples: For the improvement or good of a town: Jones v. Williams, Ambl. 651; Howse v. Chapman, 4 Ves. 542; Att'y-Gen. v. Lonsdale, 1 Sim. 105; Mitford v. Reynolds, 1 Phil. 185; Att'y-Gen. v. Bushby, 24 Beav. 299; for the benefit of the country generally: Nightingale v. Goulbourn, 2 Phil. 594; to aid in payment of the public debt: Newland v. Att'y-Gen., 3 Meriv. 684; for a parish or the parishioners: Att'y-Gen. v. Webster, L. R., 20 Eq. 483; public benefit of a town, improving streets, lighting, paving, protecting from the sea, etc.: Att'y-Gen. v. Eastlake, 11 Hare, 205, 215, 216; Att'y-Gen. v. Brown, 1 Sw. 265, 301, 302; fire companies in Pennsylvania: Humane Fire Co.'s Appeal, 88 Pa. St. 389; Bethlehem v. Perseverance Fire Co., 81 Id. 445.

[2] The decisions *appear* to be very conflicting, and it is certainly difficult to harmonize them all. The following are examples of trusts which were held *invalid* on account of too great uncertainty: A gift for "charitable *or* public purposes:" Vesey v. Jamson, 1 S. & S. 69; see Fowler v. Fowler, 33 Beav. 616; for such "objects of liberality and benevolence" as a trustee shall approve of: Morice v. B'p of Durham, 9 Ves. 399; Williams v. Kershaw, 5 Cl. & Fin. 111; Ellis v. Selby, 1 My. & Cr. 286; *per contra*, Waldo v. Caley, 16 Ves. 206; Horde v. Earl of Suffolk, 2 My. & K. 59; Johnston v. Swann, cited Ambl. 585, n.; but see comments on these cases in Ellis v. Selby, 1 My. & Cr. 286, 292, 293; also a bequest to a public body *for a purpose*, none being stated, is void: Corp. of Gloucester v. Osborn, 1 H. L. Cas. 272; S. C., *sub nom.* Corp. of Gloucester v. Wood, 3 Hare, 131, 136-148; a bequest "to the trustees of Mt. Zion chapel," etc., no purpose being stated; held that the court could not assume a charitable purpose to be intended, and the bequest was void: Aston v. Wood, L. R., 6 Eq. 419; a bequest which the executors "should apply to any charitable or benevolent purpose they might agree upon at any time;" held too indefinite and inoperative: *In re* Jarman's Estate, L. R., 8 Ch. D. 584.

Examples of trusts held valid, although uncertain in their objects or purposes. Where the intention to create a charitable trust is evident, the court will, as a rule, sustain and enforce it, although its terms are very indefinite and uncertain: Magistrates of Dundee v. Morris, 3 Macq. 134, 157; a bequest for "such charities and other public purposes as lawfully may be in the parish of T.:" Dolan v.

be carried too far. The intention of the donor to create some kind of charity, religious, benevolent, educational, or otherwise, must never be left uncertain. It must sufficiently appear that he designed to establish a charity, and the purpose must be indicated with sufficient clearness, to enable the court, by means of its settled doctrines, to carry the design into effect. Such is the well-established English doctrine, and the court strives to carry out a charity if at all practicable. In this country, the doctrine has been adopted only to a partial extent. In a few of the states where the system of charitable trusts prevails, the English theory seems to have been accepted with little or no modification. In most of the states more certainty in defining the purposes of the charity and terms of the trust, or in designating the classes of persons who are intended to be the beneficiaries, is required in order to sustain the gift, than is necessary under the methods of the English courts.[1]

Macdermot, L. R., 5 Eq. 60; 3 Ch. 676; for charitable purposes generally, no particular kind being mentioned: Att'y-Gen. v. Herrick, Ambl. 712; Chamberlayne v. Brockett, L. R., 8 Ch. 206; for such charitable purposes as the trustee or some other designated person may determine, or where the selection and application are left to the discretion of the trustees: Lewis v. Allenby, L. R., 10 Eq. 668; Wilkinson v. Barber, Id., 14 Id. 96; Wilkenson v. Lindgren, Id., 5 Ch. 570; Pocock v. Att'y-Gen., Id., 3 Ch. D. 342. For further examples of uncertain objects and purposes, see *post*, § 1027, and cases cited as illustrations of the rule of *cy pres*.

[1] It is impossible to formulate any more specific American rule, since there is a radical difference in the theories and fundamental views prevailing in various states. I shall make no attempt to analyze and classify the decisions upon this most important question, but shall simply give some examples, referring the reader to treatises upon trusts for a detailed discussion. Examples of trusts held invalid: Bequest to executors and their successors, "to be by them distributed to such persons, societies, or institutions as they may consider most deserving;" held, too indefinite and invalid as a charitable trust: Nichols v. Allen, 130 Mass. 211; compare Power v. Cassidy, 79 N. Y. 602; bequest to A. "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him;" held invalid, and the trust can not be estalished by proof of testator's oral directions: Olliffe v. Wells, 130 Mass. 221; bequest to a Sunday school, the income to be "applied in making Christmas presents to the scholars;" void, no competent trustee and no certain beneficiaries: Goodell v. Union Ass'n etc., 29 N. J. Eq. 32; devise and bequest "to the Roman Catholic orphans" of a certain diocese, the bishop as executor authorized to use the property for the benefit of said orphans; held invalid, uncertainty as to trustee and beneficiaries: Heiss v. Murphy, 40 Wisc. 276; bequest to trustees, to be expended at their discretion "for the establishment of a school at M.;" indefinite and invalid: Att'y-Gen. v. Soule, 28 Mich. 153; bequest to "benevolent, religious, *or* charitable purposes;" invalid: Thomson's Ex'rs v. Norris, 20 N. J. Eq. 489; a bequest to A., bishop of W., and his successors, in trust for the sisters of St. Joseph, an unincorporated society: Kain v. Gibboney, 11 Otto, 362; 3 Hughes, 397; a devise or bequest to trustees for the benefit of "the colored persons" of a city or state: Needles v. Martin, 33 Md. 609.

Examples of trusts held sufficiently certain and valid: Bequest to executors "to be divided by them among such R. C. charities, institutions, schools, or churches in the city of New York," as a majority of the executors should decide, there being many such institutions in New York authorized by

§ 1026. **Certainty or Uncertainty of the Trustee.**—Charitable trusts also differ from private trusts in another very important feature. It is settled, as a part of the complete system prevailing in England, that not only may the beneficiaries be uncertain, but that even where the gift is made to no certain trustee, so that the trust if private would wholly fail, a court of equity will carry the trust into effect either by appointing a trustee, or by acting itself in the place of a trustee—that is, by establishing a scheme for accomplishing the design of the donor, as though the legal title had vested in a certain trustee. This result may happen in various modes. In one class of instances the same rule is merely applied which would be invoked

law to take gifts by will: Power v. Cassidy, 79 N. Y. 602; devise or bequest to a town, or towns, or a county, for purpose of building or maintaining a school, or educating poor children, or aiding the poor, etc.: Boxford etc. Soc. v. Harriman, 125 Mass. 321 (a school); Clement v. Hyde, 50 Vt. 716 (educating poor children); Craig v. Secrist, 54 Ind. 419 (same); Mason v. Meth. Epis. Ch., 27 N. J. Eq. 47 (same and aiding poor widows); Fellows v. Miner, 119 Mass. 541 (aged and infirm poor); devise and bequest in trust "for the purpose of founding an institution for the education of youths in St. Louis Co.:" Russell v. Allen, 5 Dillon, 235; a gift to trustees to pay income to an almoner to be appointed by the probate court, and he to distribute the same among the poor widows of a certain district; held valid and not defeated by a delay of several years: Sohier v. Burr, 127 Mass. 221; a conveyance to trustees for an unincorporated church: Laird v. Bass, 50 Tex. 412; a devise of lands to trustees "for the erection of a hospital for foundlings, and for any corporation which congress may create:" Ould v. Washington Hospital, 5 Otto, 303; a bequest, the income "to help form a young men's Christian association;" also a bequest to A. "that the interest may be applied at his discretion in aid of the deserving poor of M.:" Goodell v. Union Ass'n etc., 29 N. J. Eq. 32; a bequest to a certain church "in trust to use the same to promote the religious interests of said church, and to aid the missionary, educational, and benevolent enterprises to which said church is in the habit of contributing:" De Camp v. Dobbins, 29 N. J. Eq. 36; bequest to a church, to be paid as soon as it is incorporated, "to employ in the promotion of the universalist denomination:" Trustees etc. v. Beatty, 28 N. J. Eq. 570; a devise for the establishing a school for the benefit of youth residing in New Jersey, or furnishing education to such children of the city of H. as the authorities shall permit to attend: Stevens v. Shippen, 28 N. J. Eq. 487; a conveyance of land in trust for the purpose of erecting thereon a schoolhouse and a meeting-house for divine worship: Meeting St. Bap. Soc. v. Hail, 8 R. I. 234; a bequest, the income to be applied for "the benefit of the Sabbath-school library of the first baptist church in S., or the baptist home missionary society, whichever may be deemed most suitable: Fairbanks v. Lamson, 99 Mass. 533; see also Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1; Inglis v. Sailor's Snug Harbor, 3 Peters, 99; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127; Brown v. Concord, 33 N. H. 285; Burr's Ex'rs v. Smith, 7 Vt. 241; Baker v. Smith, 13 Met. 34, 41; Jackson v. Phillips, 14 Allen, 539, 557; White v. Fisk, 22 Conn. 31; Shotwell's Ex'rs v. Mott, 2 Sandf. Ch. 46; Williams v. Williams, 8 N. Y. 525; Beekman v. Bonsor, 23 Id. 298; Bascom v. Albertson, 34 Id. 584; Witman v. Lex, 17 Serg. & R. 88; Brendle v. German Ref. Cong., 33 Pa. St. 415, 418; Philadelphia v. Girard's Heirs, 45 Id. 9; Miller v. Porter, 53 Id. 292; Gallego's Ex'rs v. Att'y-Gen., 3 Leigh, 450; Venable v. Coffman, 2 W. Va. 310; McAuley v. Wilson, 1 Dev. Eq. 276; Att'y-Gen. v. Jolly, 2 Strobh. Eq. 379; Carter v. Balfour, 18 Ala. 814; Dickson v. Montgomery, 1 Swan, 348; Att'y-Gen. v. Wallace, 7 B. Mon. 611; Urmey's Ex'r v. Wooden, 1 Ohio St. 160; Gilman v. Hamilton, 16 Ill. 225.

under like circumstances to regulate the administration of a private trust. Where a testator has expressly purported to give the property to a trustee, but for any cause the appointment fails, the charitable trust will still be enforced.[1] The doctrine, however, goes much further than this simple rule which does not permit a trust otherwise valid to fail for want of a designated trustee. It also applies where the property is given to a person or body incapable of *taking and holding in perpetuity;* or to a body uncertain, indefinite, and fluctuating in its members, such as an unincorporated society; or to a body not in legal being, as to a corporation not in existence; and even where there is no person or body indicated as the recipients of the legal title, but the property is merely directed to be applied to some designated charitable purpose, the performance of which direction might and often would necessarily create a perpetuity.[2]

[1] As where a testator gives property to be applied in charity to such person as he shall hereafter in his will appoint his executor, and he neglects to appoint any one; or, having appointed one, the person dies in the testator's life-time, and none other is named; or the testator gives his property to such person as his executor shall name, and no executor at all is appointed, or if appointed he dies in the testator's life-time; or if the property is given to certain trustees and they all die in the testator's life-time; or the trustee named refuses to act; in all such cases the court carries out the intended charity as stated in the text; Mills v. Farmer, 1 Meriv. 55, 96; Moggridge v. Thackwell, 3 Bro. Ch. 517; 1 Ves. 464; 7 Id. 36, 69; Att'y-Gen. v. Jackson, 11 Id. 365, 367; White v. White, 1 Bro. Ch. 12; Att'y-Gen. v. Hickman, 2 Eq. Cas. Abr. 193; Brown v. Kelsey, 2 Cush. 243; Winslow v. Cummings, 3 Cush. 358, 365; McCord v. Ochiltree, 8 Blackf. 15, 22; Sohier v. Burr, 127 Mass. 221.

[2] The following are some of the many cases in which this doctrine is either applied or discussed: to a body not in existence, Att'y-Gen. v. Bunce, L. R., 6 Eq. 563; *In re* Maguire, Id., 9 Id. 632; to unincorporated fluctuating associations, Cocks v. Manners, Id., 12 Id. 574; and see Gower v. Mainwaring, 2 Ves. Sen. 87, 89, *per* Lord Hardwicke; Att'y-Gen. v. Oglander, 3 Bro. Ch. 166; Att'y-Gen. v. Green, 2 Id. 490; White v. White, 1 Id. 12; Att'y-Gen. v. Boultbee, 2 Ves. 380; Att'y-Gen. v. Bowyer, 3 Id. 714; Att'y-Gen. v. Comber, 2 S. & S. 93; Att'y-Gen. v. Downing, Ambl. 550, 571.

There is a fundamental divergence between two classes of American decisions upon this question. In some states the English doctrine as stated in the text is adopted, except so far as it is enlarged by the further and distinct doctrine of *cy pres;* in others, charitable trusts are sustained and enforced only when the legal title to the property is given by the donor to a certain trustee competent to take and hold in perpetuity if the trust creates one. The following cases are given simply as examples. Gifts to unincorporated societies held valid, Laird v. Bass, 50 Tex. 412; Cruse v. Axtell, 50 Ind. 49; gift to an unincorporated society, or uncertain and fluctuating body held invalid, Goodell v. Union Ass'n etc., 29 N. J. Eq. 32 (to a Sunday school); Heiss v. Murphey, 40 Wisc. 276 ("to the Roman Catholic orphans" of a diocese); gift to a corporation not yet created, but its incorporation expected, valid, Ould v. Washington Hospital, 5 Otto, 303; Trustees etc. v. Beatty, 28 N. J. Eq. 570; gift to the treasurer of a county and his successors in office, the income for aiding poor, held valid, Clement v. Hyde, 50 Vt. 716; where a bequest was made to two towns in trust to apply the income to the education of poor children and the relief of poor widows, it was held that the town was not a proper trustee, but the charity would not fail on that account, for the court would appoint a trustee, Mason

This is one of the most important points of distinction between charitable and private trusts; for it is certain that at law, and independently of the peculiar doctrine of equity on this subject, gifts to charitable uses, without a certain and competent trustee to take and hold the legal title—as to an unincorporated and fluctuating society—would be wholly void.[1] The doctrine, however, is rejected by the courts of several American states, which admit the existence and validity of charitable trusts, only in cases where the property is given to a certain and competent trustee.

§ 1027. **The Doctrine of Cy Pres.**—In administering charitable gifts, the English courts have leaned so strongly in favor of sustaining the trusts, even when the donor's specified purpose becomes impracticable, that they invented at an early day, and have fully established, the so-called doctrine of *cy pres*. This doctrine may be stated in general terms, as follows: Where there is an intention exhibited to devote the gift to charity, and no object is mentioned, or the particular object fails, the court will execute the trust *cy pres*, and will apply the fund to some charitable purposes, similar to those (if any) mentioned by the donor. "If the donor declare his intention in favor of charity indefinitely, without any specification of objects, or in favor of defined objects which happen to fail from whatever cause—even though in such cases the particular mode of operation contemplated by the donor is uncertain or impracticable—yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect."[2] In the first kind of cases, where the donor

v. Meth. Epis. Ch., 27 N. J. Eq. 47; gift to a bishop and his successors in trust for an object which would be or might be a perpetuity, held void, Kain v. Gibboney, 11 Otto, 362; 3 Hughes, 397; Heiss v. Murphy, 40 Wisc. 276. See, also, Preachers' Aid Soc. v. Rich, 45 Me. 552; Tappan v. Deblois, 45 Id. 122; Swasey v. Am. Bible Soc., 57 Id. 523; Tucker v. Seamen's Aid Soc., 7 Met. 188, 195; Bliss v. Am. Bible Soc., 2 Allen, 334; Meeting St. Bap. Soc. v. Hail, 8 R. I. 234; Birchard v. Scott, 39 Conn. 63; Goodell v. Union Ass'n etc., 29 N. J. Eq. 32; Stevens v. Shippen, 28 Id. 487; Philadelphia v. Fox, 64 Pa. St. 169; Zeisweiss v. James, 63 Id. 465; State v. Warren, 28 Md. 338; Needles v. Martin, 33 Id. 609; Miller v. Atkinson, 63 N. C. 537; McIntyre v. Zanesville, 17 Ohio St. 352; Board of Ed. v. Edson, 18 Id. 221; *Ex parte* Lindley, 32 Ind. 367; Att'y-Gen. v. Soule, 28 Mich. 153; Methodist Ch. v. Clark, 41 Id. 730; Heuser v. Harris, 42 Ill. 425; Acad. of Visitation v. Clemens, 50 Mo. 167; Estate of Hinckley, 8 Pac. Law J. 407 (Cal.)

[1] Att'y-Gen. v. Tancred, Ambl. 351; 1 W. Bl. 90; Widmore v. Woodroffe, Ambl. 636, 640; Anon., 2 Ch. Cas. 207; Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1; McCord v. Ochiltree, 8 Blackf. 15, 22; Grimes' Ex'rs v. Harmon, 35 Ind. 198; Levy v. Levy, 33 N. Y. 97, 102, cases cited by Wright, J.

[2] In the following cases this doctrine is defined, discussed, applied, and il-

has specified no object, the court will determine upon some scheme which shall carry out the general intention; in the second kind, where the donor's specified object fails, the court will determine upon another object similar to that mentioned by the donor. A limitation upon the generality of the doctrine seems to be settled by the recent decisions, that where the donor has not expressed his charitable intention generally, but only by providing for one specific particular object, and this object can not be carried out, or the charity provided for ceases to exist before the gift takes effect, then the court will not execute the trust; it wholly fails.[1] The true doctrine of *cy pres* should not be confounded, as is sometimes done, with the more general principle which leads courts of equity to sustain and enforce charitable gifts where the trustee, object, and beneficiaries are simply *uncertain*. There is a radical distinction between the two, although the doctrine of *cy pres* may be to some extent an expansion or enlargement of the other principle.[2] In the great majority of the American states the courts have utterly rejected the peculiar doctrine of *cy pres* as inconsistent with our institutions and modes of public administration. A few of the states have accepted it in a modified and partial form.[3]

lustrated: Sinnett v. Herbert, L. R., 7 Ch. 232; Chamberlayne v. Brockett, Id., 8 Ch. 206; Att'y-Gen. v. Baxter, 1 Vern. 248; Att'y-Gen. v. Andrew, 3 Ves. 633; Corbyn v. French, 4 Id. 418; Att'y-Gen. v. B'p of Oxford, cited 4 Id. 431; Cary v. Abbot, 7 Id. 490; Moggridge v. Thackwell, Id. 36; Mills v. Farmer, 1 Meriv. 55; 19 Ves. 483, 485; Pieschel v. Paris, 2 S. & S. 384; De Costa v. De Pas, Ambl. 228; 2 Sw. 487; Hayter v. Trego, 5 Russ. 113; Simon v. Barber, 5 Id. 112; Att'y-Gen. v. Iron Mongers Co., Cr. & Ph. 208; 10 Cl. & Fin. 908; Att'y-Gen. v. Glyn, 12 Sim. 84; Att'y-Gen. v. B'p of Llandaff, cited 2 My. & K. 586; Incorporated Soc. v. Price, 1 Jo. & Lat. 498; Loscombe v. Wintringham, 13 Beav. 87; Bennett v. Hayter, 2 Id. 81; Marsh v. Att'y-Gen., 2 J. & H. 61; Att'y-Gen. v. Marchant, L. R., 3 Eq. 424; Att'y-Gen. v. Bunce, Id., 6 Eq. 563; *In re* Latymer's Charity, Id., 7 Eq. 353; *In re* Maguire, Id., 9 Eq. 632; Merchant Tailors' Co. v. Att'y-Gen., Id., 11 Eq. 35; 6 Ch. 512; *In re* Prison Charities, Id., 16 Eq. 129; Att'y-Gen. v. St. John's Hospital, Id., 1 Ch. 92; 2 Ch. D. 554; Manchester School Case, Id., 2 Ch. 497; Att'y-Gen. v. Wax Chandlers' Co., Id., 5 Ch. 503; Att'y-Gen. v. Duke of Northumberland, Id., 7 Ch. D. 745.

[1] Fisk v. Att'y-Gen., L. R., 4 Eq. 521; New v. Bonaker, Id., 4 Eq. 655; *In re* Clerk's Trust, Id., 1 Ch. D. 497; Clephane v. Prov. of Edinburgh, Id., 1 Sc. App. 417; Cherry v. Mott, 1 My. & Cr. 123; Clark v. Taylor, 1 Drew. 642; Russell v. Kellett, 3 Sm. & Giff. 264; Langford v. Gowland, 3 Giff. 617.

[2] Some of the cases in which the court has professedly relied on the doctrine of *cy pres*, and which are cited as illustrations of it, in a preceding note, seem to be nothing more than instances in which trusts with uncertain trustees or objects have been sustained. The suggestion of the text is not merely verbal; it has a practical importance in this country. It shows that the courts in the American states, which have utterly rejected the doctrine of *cy pres*, *may* sustain and enforce charitable trusts which are simply uncertain in their objects or their trustees, and still be consistent with the general position which they have assumed.

[3] It has generally been said that the doctrine of *cy pres* and the power to enforce it, belong to and result from the *executive* authority, held by the

§ 1028. **Origin and Extent of the Equitable Jurisdiction.** Such being the general nature of charitable trusts, the origin and extent of the jurisdiction over them remain to be examined. The question is one of little practical importance in England, since the jurisdiction is there exercised as though it were entirely derived from the statute of charitable uses of Elizabeth.[1] The question, however, becomes of vital importance in this country—is absolutely fundamental—since the statute of Elizabeth has been held to be in force in but a very few of the states. The opinion at one time prevailed, that the peculiar equitable jurisdiction over charities, except in cases where a trust valid by the ordinary rules of law and equity was created, was derived solely from the statute.[2] Other English judges have maintained the opinion that the jurisdiction in its full extent was possessed by the court of chancery by virtue of its general powers, and that the statute had only the effect to regulate that jurisdiction, and to define more distinctly the classes of objects which are charitable. This conclusion has been sustained and even demonstrated as correct by the researches of the English "Record Commissioners."[3] The question has been repeatedly

English chancellor as a representative of the crown in its character as *parens patriæ*, and are not a part of the judicial functions possessed by the *court* of chancery; while in the United States the courts are clothed with judicial functions only, the prerogative belonging to the *parens patriæ* being held by the legislatures. It may well be doubted, I think, whether this view is entirely correct. See Starkweather v. Am. Bible Soc., 72 Ill. 50; Heiss v. Murphey, 40 Wisc. 276; Heuser v. Harris, 42 Ill. 425; Gilman v. Hamilton, 16 Id. 225.

[1] 43 Eliz., ch. 4. This statute, in particular and definite manner, declares the powers of chancery, regulates the proceedings for the enforcement of charitable trusts, and enumerates the purposes which are charitable as quoted *ante*, in § 1020.

[2] This view was sustained by *dicta* of some able English judges, and by some decisions of American courts. See a *dictum* of Lord Loughborough in Att'y-Gen. v. Bowyer, 3 Ves. 714, 726; and the decisions in Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1; Gallego's Ex'rs v. Att'y-Gen., 3 Leigh, 450; McCord v. Ochiltree, 8 Blackf. 15, 22; Common Council of Richmond v. The State, 5 Ind. 334. These two cases held that the jurisdiction was derived solely from the statute, and that the statute was in force in Indiana, but they were completely overruled as to both points by Grimes' Ex'rs v. Harmon, 35 Ind. 198. The early Massachusetts cases, Going v. Emery, 16 Pick. 107, and Burbank v. Whitney, 24 Id. 146, seem to intimate that the statute was in force in Massachusetts, and that the jurisdiction was based upon it; but this view was finally discarded in Bartlett v. Nye, 4 Met. 378. In Illinois, the statute seems to be regarded as the source of jurisdiction. Starkweather v. Am. Bible Soc., 72 Ill. 50; Heuser v. Harris, 42 Ill. 425; Gilman v. Hamilton, 16 Id. 225.

[3] Burford v. Lenthall, 2 Atk. 551; and Att'y-Gen. v. Middleton, 2 Ves. Sen. 327, *per* Lord Hardwicke; Att'y-Gen. v. Tancred, Ambl. 351; 1 W. Bl. 90; 1 Eden, 10, *per* Lord Northington; Att'y-Gen. v. Skinners' Co., 2 Russ. 407, 420, *per* Lord Eldon, a very decided opinion of Lord Redesdale in Att'y-Gen. v. Mayor etc. of Dublin, 1 Bligh, N. S. 312, 347, 348; and equally clear opinion of Lord Chan. Sugden, in Incorporated Soc. v. Richards, 1 Dr. & War. 258; 1 Con. & Law. 58. The examination of the ancient records of the court of chancery by the commissioners has disclosed a large number of cases

passed upon by the American courts. Wherever the system of charitable trusts has been accepted at all, it has generally been held that the jurisdiction belongs to equity as a part of its ordinary authority over express trusts, and is not referable for its origin to the statute of Elizabeth. This conclusion was necessary to support the jurisdiction in a great majority of the states, since that statute had not been adopted as a part of their local legislation.[1]

§ 1029. **Charitable Trusts in the United States.**—With regard to the extent to which charitable trusts have been adopted, and the jurisdiction over them exercised, in the various states, there is the utmost conflict of judicial decision. It seems possible, however, without attempting any strict comparison of the cases or any minute classifications of the rules, to arrange the different states according to three general types, which shall represent with reasonable accuracy and certainty, the existing condition of the law on the subject in this country. *First Class.*—This class includes those states in which charitable trusts have been abrogated or not adopted.[2] Either from a stat-

brought in that court and decided prior to the statute, in which charities of the most indefinite and general character were sustained, thus proving that the court then exercised the same kind of jurisdiction which it has exercised since the statute. See Cooper's Public Records, p. 355.

[1] The position above stated is affirmed in the most positive manner by repeated and most able decisions of the United States Supreme Court. Ould v. Washington Hospital, 5 Otto, 303; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127, 155, 194, 196; Wheeler v. Smith, 9 Id. 55, 77; Fontain v. Ravenel, 17 Id. 369; Griffith v. State, 2 Del. Ch. 421; State v. Griffith, 2 Id. 392; Estate of Hinckley, 8 Pac. Law. J. 407; Howard v. Am. Peace Soc., 49 Me. 288; Clement v. Hyde, 50 Vt. 716; Ex'rs of Burr v. Smith, 7 Vt. 241; Bartlett v. Nye, 4 Met. 378; Going v. Emery, 16 Pick. 107; Burbank v. Whitney, 24 Id. 146 (these two latter cases left the question in some doubt); McCartee v. Orphan Asylum Soc., 9 Cow. 437, 474–482, *per* Jones, Chan.; Williams v. Williams, 8 N. Y. 525; Andrew v. N. Y. Bible Soc., 4 Sandf. 156; Ayres v. Methodist Ch., 3 Id. 351; Bascom v. Albertson, 34 N. Y. 584, 604; Norris v. Thomson's Ex'rs, 19 N. J. Eq. 307; Comm'rs of Lagrange Co. v. Rogers, 55 Ind. 297; Grimes' Ex'rs v. Harmon, 35 Id. 198, overruling McCord v. Ochiltree, 8 Blackf. 15; Miller v. Chittenden, 2 Clarke, 315; Dickson v. Montgomery, 1 Swan, 348; Carter v. Balfour's Adm'r, 19 Ala. 814; Beal v. Fox's Ex'rs, 4 Ga. 404.

[2] The excepted instances authorized by statute are generally cases where corporations may receive and hold property in trust for some object which is charitable. The states constituting this class are the following:

New York.—Bascom v. Albertson, 34 N. Y. 584; Levy v. Levy, 33 Id. 97; Holmes v. Mead, 52 Id. 332; Beekman v. Bonsor, 23 Id. 298; Dodge v. Pond, Id. 69; Burrill v. Boardman, 43 Id. 254, 263; Adams v. Perry, Id. 487; Rose v. Rose, 4 Abb. App. Dec. 108; but see Power v. Cassidy, 79 N. Y. 602, where a will gave property to his executors "to be divided by them among such Roman Catholic charities, institutions, schools, or churches in the city of New York" as a majority of his executors should decide, and in such proportions as they should think proper. There were in New York city many such Roman Catholic institutions incorporated and authorized by statute to take by devise or bequest; a majority of the executors designated certain of these institutions as the beneficiaries. Held, the testa-

utory abolition of all uses and trusts with a few specified exceptions, or from the general provisions of the law against perpetuities, or from the general policy of the state legislation, "charitable trusts" do not exist at all, except where they are merely the express private trusts permitted by the law, or except in those particular instances authorized by statute. The equitable system of distinctively charitable trusts is abandoned. *Second Class.*—This class includes the larger portion of the states, in which "charitable trusts" exist under a somewhat modified and restricted form.[1] There is not a little divergence

mentary disposition was not void from uncertainty, but was operative, and the acts of the executors were effectual. This result, of course, depended upon the fact that all the beneficiaries were corporations authorized to hold property in trust for charitable purposes. In Williams v. Williams, 8 N. Y. 525, a majority of the court of appeals admitted the doctrine under great restrictions; but this decision, and all the earlier ones which sustained the doctrine to a much fuller extent, have been overruled by the cases above cited.

Wisconsin.—Ruth v. Oberbrunner, 40 Wisc. 238; Heiss v. Murphey, Id. 276; see Dodge v. Williams, 46 Id. 70; Gould v. Taylor Orphan Asylum, Id. 106, for examples of gifts to corporations.

Michigan.—Methodist Ch. v. Clark, 41 Mich. 730 (there is no distinction between trusts for charitable purposes and any others, and the same requisites are necessary to their validity); see Att'y-Gen. v. Soule, 28 Mich. 153. In all the foregoing states the same type of statute has been adopted in terms abolishing all uses and trusts except a few well-defined species of active express trusts which do not include any ordinary form of charitable use. The courts of these states have felt themselves compelled to hold that all charitable trusts were abolished, except such as would be valid forms, under the exceptions of the statute. No other conclusion seems to me possible, except by a judicial repeal of the legislation.

Maryland.—Dashiell v. Att'y-Gen., 5 H. & J. 392, 400; 6 Id. 1; Wilderman v. Baltimore, 8 Md. 551; Methodist Church v. Warren, 28 Id. 338, 353; Needles v. Martin, 33 Id. 609; Murphy v. Dallam, 1 Bland, 529.

North Carolina.—McAuley v. Wilson, 1 Dev. Eq. 276; Trustees v. Chambers' Ex'rs, 3 Jones' Eq. 253; Holland v. Peck, 2 Ired. Eq. 255; White v. Att'y-Gen., 4 Id. 19; Miller v. Atkinson, 63 N. C. 537.

Virginia.—Virginia v. Levy, 23 Gratt. 21; Carter v. Wolfe, 13 Id. 301; Seaburn's Ex'r v. Seaburn, 15 Id. 423; Gallego's Ex'rs v. Att'y-Gen., 3 Leigh, 450; Kain v. Gibboney, 11 Otto, 362; 3 Hughes C. C. 397.

West Virginia.—Venable v. Coffman, 2 W. Va. 310; Carpenter v. Miller's Ex'r, 3 Id. 174.

In all these states a trust for charitable purposes would be upheld, provided it possessed all the elements of a valid ordinary private trust—that is, the trustee was a certain person competent to take and hold the property, the beneficiaries were certain or capable of being made so, and no perpetuity was created. In other words, an express trust otherwise valid, would not become invalid because the ultimate purpose was charitable.

[1] The following states are placed in this class; but there is a great diversity in the particular rules prevailing in the different states, and only a *general* resemblance in their decisions.

Alabama. — Johnson's Adm'r v. Longmire, 39 Ala. 143; Williams v. Pearson, 38 Id. 299; Carter v. Balfour's Adm'r, 19 Id. 814; Antones v. Eslava, 9 Port. 527.

Arkansas.—Grissom v. Hill, 17 Ark. 483.

California.—Hinckley's Estate, 8 Pac. Law J. 407.

Connecticut.—Bull v. Bull, 8 Conn. 47; Chatham v. Brainerd, 11 Id. 60; Brewster v. McCall, 15 Id. 274; Am. Bible Soc. v. Wetmore, 17 Id. 181; Hampden v. Rice, 24 Id. 350; White v. Fisk, 22 Id. 31; Treat's Appeal, 30 Id. 113; Birchard v. Scott, 39 Id. 63. A statute similar to that of Eliz. is enacted.

in the views maintained by the courts of the various states composing this class. In a few of them the statute of Elizabeth is held to be in force, or one similar to it has been enacted. In the majority of them the doctrine of charitable trusts, as a part of the ordinary jurisdiction and functions of equity, has been

Delaware.—Griffith v. State, 2 Del. Ch. 421; State v. Griffith, 2 Id. 392.

Georgia.—Walker v. Walker, 25 Ga. 420; Beall v. Fox, 4 Id. 404; Jones v. Habersham, 3 Woods, 443.

Illinois.—Starkweather v. Am. Bible Soc., 72 Ill. 50; Heuser v. Harris, 42 Id. 425; Gilman v. Hamilton, 16 Id. 225.

Indiana.—Comm'rs of Lagrange Co. v. Rogers, 55 Ind. 297; Craig v. Secrist, 54 Id. 419; Cruse v. Axtell, 50 Id. 49; Grimes' Ex'rs v. Harmon, 35 Id. 198; *Ex parte* Lindley, 32 Id. 367; Sweeney v. Sampson, 5 Id. 465; Common Council of Richmond v. The State, 5 Id. 334; McCord v. Ochiltree; 8 Blackf. 15.

Iowa.—Miller v. Chittenden, 2 Iowa, 315, 352; Johnson v. Mayne, 4 Id. 180; Lepage v. McNamara, 5 Id. 124, 146.

Louisiana.—Soc. of Orphan Boys v. New Orleans, 12 La. An. 62; New Orleans v. McDonogh, 12 Id. 240; Fink v. Ex'r of Fink, 12 Id. 301.

Maine.—Maine Bapt. Miss. Con. v. Portland, 65 Me. 92; Swasey v. Am. Bible Soc., 57 Id. 523; Howard v. Am. Peace Soc., 49 Id. 288; Preachers' Aid Soc. v. Rich, 45 Id. 552; Tappan v. Deblois, 45 Id. 122; Shapleigh v. Pilsbury, 1 Id. 271.

Mississippi.—Wade v. Am. Colon. Soc., 7 Sm. & Mar. 663.

Missouri.—State v. Prewett, 20 Mo. 165; Chambers v. St. Louis, 29 Id. 543; Russell v. Allen, 5 Dillon, 235; Acad. of Visitation v. Clemens, 50 Mo. 167.

New Hampshire.—Dublin Case, 38 N. H. 459; Chapin v. School Dist., 35 Id. 445; Brown v. Concord, 33 Id. 285; Second Cong. Soc. v. First Cong. Soc., 14 Id. 315; Duke v. Fuller, 9 Id. 536.

New Jersey.—Goodell v. Union Ass'n, 29 N. J. Eq. 32; De Camp v. Dobbins, 29 Id. 36; Trustees etc. v. Beatty, 28 Id. 570; Stevens v. Shippen, 28 Id. 487; Mason's Ex'rs v. Meth. Epis. Ch., 27 Id. 47; Thomson's Ex'rs v. Norris, 20 Id. 489; Norris v. Thomson's Ex'rs, 19 Id. 307; Att'y-Gen. v. Moore's Ex'rs, 19 Id. 503.

Ohio.—Am. Bible Soc. v. Marshall, 15 Ohio St. 537; Urmey's Ex'rs v. Wooden, 1 Id. 160; Hullman v. Honcomp, 5 Id. 237; McIntire's School v. Zanesville, 9 Ohio, 203.

Pennsylvania.—Humane Fire Co.'s Appeal, 88 Pa. St. 389; Swift's Ex'rs v. Eaton Beneficial Soc., 73 Id. 362; Zeisweiss v. James, 63 Id. 465; Mayer v. Soc. for Visitation of the Sick, 2 Brews. 385; Philadelphia v. Girard, 45 Pa. St. 9; McLean v. Wade, 41 Id. 266; Miller v. Porter, 53 Id. 292; Henderson v. Hunter, 59 Id. 335; Philadelphia v. Fox, 64 Id. 169; Soohan v. Philadelphia, 33 Id. 9; Price v. Maxwell, 28 Id. 23; Griffitts v. Cope, 17 Id. 96; McLain v. School Directors, 51 Id. 196; Evangelical Association's Appeal, 35 Id. 316; Mission. Society's Appeal, 30 Id. 425; Cresson's Appeal, 30 Id. 437; Barr v. Weld, 24 Id. 84; Brendle v. German Ref. Cong., 33 Id. 415; Witman v. Lex, 17 S. & R. 88; Gregg v. Irish, 6 Id. 211; Wright v. Linn, 9 Barr, 433; Pickering v. Shotwell, 10 Id. 23; Hillyard v. Miller, 10 Id. 326; Method. Ch. v. Remington, 1 Watts, 218; Martin v. McCord, 5 Watts, 493; *Ex parte* Cassel, 3 Id. 408; 440; Morrison v. Beirer, 2 W. & S. 81; Zimmerman v. Anders, 6 Id. 218; Philadelphia v. Elliott, 3 Rawle, 170; Girard v. Philadelphia, 7 Wall. 1; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127.

Rhode Island.—Meeting St. Bap. Soc. v. Hail, 8 R. I. 234; Potter v. Thornton, 7 Id. 252; Derby v. Derby, 4 Id. 414.

South Carolina.—Att'y-Gen. v. Jolly, 1 Rich. Eq. 99; 2 Stroth. Eq. 379; Att'y-Gen. v. Clergy Soc., 8 Rich. Eq. 190; Gibson v. McCall, 1 Rich. Law, 174; Combe v. Brazier, 2 Desaus. Eq. 431.

Tennessee.—Dickson v. Montgomery, 1 Swan, 348; White v. Hale, 2 Coldw. 77; Gass v. Ross, 3 Sneed, 211; Franklin v. Armfield, 2 Id. 305; Green v. Allen, 5 Humph. 170.

Texas.—Laird v. Bass, 50 Tex. 412; Paschal v. Acklin, 27 Id. 173; Bell Co. v. Alexander, 22 Id. 350; Hopkins v. Upshur, 20 Id. 89.

Vermont.—Clement v. Hyde, 50 Vt.

accepted in a modified and limited form; such trusts are upheld when the property is given to a person sufficiently certain, and for an object sufficiently definite. With regard to this element of certainty in the trustee and the objects there is much diversity of decision. The doctrine of *cy pres* is generally rejected. *Third Class.*—This class includes a very few states which have accepted the doctrine in its full extent.[1] The states composing this group have not even totally rejected the doctrine of *cy pres*, although they do not apply it so freely and under such extreme circumstances as would be done in England. The general system seems at least to be so far adopted, that when an intention to give property to charitable uses is clearly manifested, but the disposition is uncertain and indefinite either as to the trustee or as to the objects and beneficiaries, the trust is upheld or defeated upon the same principles as those which would be followed by the English courts.

716; Burr v. Smith, 7 Id. 241; Penfield v. Skinner, 11 Id. 296; Stone v. Griffin, 3 Id. 400.

United States Supreme Court.—Ould v. Washington Hospital, 5 Otto, 303; Kain v. Gibboney, 11 Id. 362; 3 Huges, 397; Girard v. Philadelphia, 7 Wall. 1; Vidal v. Girard's Ex'rs, 2 How. 127; Wheeler v. Smith, 9 Id. 55; Fontain v. Ravenel, 17 Id. 369; Bap. Ass'n v. Hart's Ex'rs, 4 Wheat. 1.

A few of the states in this list—e. g., New Jersey—might perhaps be properly placed in the third class, since their courts uphold trusts very uncertain, both as to trustee and object; but none of them, I believe, profess to accept the English doctrine in all its fullness.

[2] *Massachusetts.*—The doctrine is freely and fully accepted, and the rule of *cy pres* is enforced. Att'y-Gen. v. Parker, 126 Mass. 216; Sohier v. Burr, 127 Id. 221; Boxford etc. Soc. v. Harriman, 125 Id. 321; McDonald v. Mass. Gen. Hospital, 120 Id. 432; Old South Soc. v. Crocker, 119 Id. 1; Fellows v. Miner, 119 Id. 541; Gooch v. Ass'n for Relief, etc., 109 Id. 558; Nichols v. Allen, 130 Id. 211; Olliffe v. Wells, 130 Id. 221; Att'y-Gen. v. Garrison, 101 Id. 223; Fairbanks v. Lamson, 99 Id. 533; Hosea v. Jacobs, 98 Id. 65; Jackson v. Phillips, 14 Allen, 539; Att'y-Gen. v. Old South Soc., 13 Allen, 474; Saltonstall v Sanders, 11 Allen, 446; Odell v. Odell, 10 Allen, 1; Drury v. Natick, Id. 169; Att'y-Gen. v. Trinity Ch., 9 Id. 422; Dexter v. Gardner, 7 Id. 243; Tainter v. Clark, 5 Id. 66; Bliss v. Am. Bible Soc., 2 Id. 334; Easterbrooks v. Tillinghast, 5 Gray, 171; Am. Acad. v. Harvard Coll., 12 Gray, 582; Wells v. Heath, 10 Gray, 17; North Adams etc. Soc. v. Fitch, 8 Id. 421; Harvard Coll. v. Soc. Prom. Theol. Educ., 3 Id. 280; Wells v. Doane, Id. 201; Earle v. Wood, 8 Cush. 430; Nourse v. Merriam, Id. 11; Parker v. May, 5 Id. 336; Winslow v. Cummings, 3 Id. 358; Brown v. Kelsey, 2 Id. 243; Baker v. Smith, 13 Met. 34; Sohier v. St. Paul's Ch. 12 Id. 250; Washburn v. Sewall, 9 Id. 280; Tucker v. Seaman's Aid Soc., 7 Id. 188; Bartlett v. Nye, 4 Id. 378; Burbank v. Whitney, 24 Pick. 146; Sanderson v. White 18 Id. 328; Going v. Emery, 16 Id. 107; Hadley v. Hopkins Acad., 14 Id. 240; Bartlett v. King, 12 Mass. 537; Barker v. Wood, 9 Id. 419.

Kentucky.—The statute is adopted, and the court carries out the doctrine fully, in cases of uncertain trustees and objects, applying the rule of *cy pres*. Cromies v. Louisville etc. Soc., 3 Bush, 365; Bap. Church v. Presb. Church, 18 B. Mon. 635; Hadden v. Chorn, 8 Id. 70; Att'y-Gen. v. Wallace, 7 Id. 611; Moore v. Moore, 4 Dana, 354; Gass v. Wilhite, 2 Id. 170.

SECTION V.

TRUSTS ARISING BY OPERATION OF LAW—RESULTING AND CONSTRUCTIVE TRUSTS.

ANALYSIS.

§ 1030. General nature and kinds.
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§§ 1032–1036. First form: trusts resulting to donor.
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§ 1033. Same; essential elements.
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§ 1053. 8. Trusts *ex maleficio.*
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§ 1055. (2) Purchase upon a fraudulent verbal promise.
§ 1056. (3) No trust from a mere verbal promise.
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§ 1058. Rights and remedies of the beneficiaries.

§ 1030. **General Nature and Kinds.**—The second main division of trusts, and the one which, in this country especially, affords the widest field for the jurisdiction of equity in granting its special remedies so superior to the mere legal recoveries of damages, embraces those which arise by operation of law, from the deeds, wills, contracts, acts, or conduct of parties, either with or without their intention, but without any exp

of creation.[1] A broad distinction separates all express trusts from those which arise by operation of law. In the former class the trust relation is rightful and permanent. In the latter, there is no such element of right and permanency. Even if the trust relation is not wholly wrongful, resulting from fraud or other unconscientious act, still a certain antagonism between the *cestui que trust* and the trustee is involved in the very existence of the trust; and instead of the idea of permanence, the substantial right of the beneficiary is that the trust should be ended by a conveyance of the legal title to himself.[2] All trusts by operation of law consist, therefore, in a separation of the legal and the equitable estates, one person holding the legal title for the benefit of the equitable owner, who is regarded by equity as the *real* owner, and who is entitled to be clothed with the legal title by a conveyance.[3] Certain instances of this class are trusts only *sub modo;* they are termed trusts, because the beneficial owner is entitled to the same remedies against the holder of the legal title, which are given to the beneficiary under a true trust.[4] All trusts which arise by operation of law, are, as the name indicates, excepted from the requirements of the statute of frauds.[5] This entire grand division consists of two general classes: resulting

[1] The proposed civil code of New York (§ 1169) and the civil code of California (§ 2217) have invented the wholly unnecessary name of "involuntary trusts" to designate this class. Express trusts they call "voluntary," and define in such general and inaccurate terms that a voluntary trust is made to include *every* instance of fiduciary position, an attorney, agent, and even a confidential employee. There is, of course, the common element of *confidence* in all these fiduciary relations and in trusts; but the essential conception of a "trust" is, that it always involves and relates to *property;* "trust," in its legal meaning, not only describes a confidential relation between two persons, but also includes the property which is the subject-matter of that relation, and which is stamped with the trust character. A legal "trust" is necessarily a species of *ownership*. The most natural and simple name by which to designate the entire class of trusts arising by operation of law, would be "implied trusts." as listinguished from "ex- Nichols v created by words inten- Olliffe v. Vi. Unfortunately, however, the term "implied trusts" is constantly used by text-writers and judges in so many and varying senses, that it would only produce confusion and uncertainty if one should employ it in this single and restricted meaning.

[2] See vol. 1, § 148.

[3] The correctness of this conclusion is shown by the fact that no resulting or constructive trust growing out of the relations of parties or the use of funds, will be enforced against the holder of the legal title who is clothed with an equal equity, even in favor of an infant. Haggard v. Benson, 3 Tenn. Ch. 268.

[4] This is especially true of those trusts *ex maleficio* which arise from actual fraud, and certain others which arise from a breach of fiduciary duty. See *post*, § 1053, concerning "constructive trusts."

[5] See *ante*, § 1008; Ward v. Armstrong, 84 Ill. 151. It follows that such trusts need not be "declared" nor "evidenced" by any writing; the fact of their existence may be proved by parol.

trusts and constructive trusts. The line of distinction between these two classes is clear and definite; the failure to observe it has produced much unnecessary confusion.[1] I shall describe, *first*, resulting trusts, and, *second*, constructive trusts, following a classification which seems to me the necessary consequence of fundamental principles.

§ 1031. **First. Resulting Trusts.**—In all species of resulting trusts *intention* is an essential element, although that intention is never expressed by any words of direct creation. There must be a transfer, and equity infers the intention that the transferee was not to receive and hold the legal title as the beneficial owner, but that a trust was to arise in favor of the party whom equity would regard as the beneficial owner under the circumstances. The equitable theory of *consideration*, heretofore explained, is the source and underlying principle of the entire class.[2] Resulting trusts, therefore, are those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears, or is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title. In such case a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner. This person is the one from whom the consideration actually comes, or who represents or is identified in right with the consideration; the resulting trust follows or goes with the real consideration.[3] All true resulting trusts may be reduced to two general types: (1) Where there is a gift to A., but the intention appears, from the terms of the instrument, that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest, or only a part of it. In order that a case of this kind may arise, there must

[1] Hardly any two writers *entirely* agree in their classification of resulting and constructive trusts; the same instances are treated by some as resulting, by others as constructive. Even courts have sometimes failed to recognize the line of distinction which separates the two; thus, in a recent case, Bickel's Appeal, 86 Pa. St. 204, the court are represented as holding that a resulting trust in land only arises from fraud in obtaining the land, or from the payment of the purchase money. In any accurate sense of the term a resulting trust *never* arises from fraud.

[2] See *ante*, § 981.

[3] The *theory* of equity is that a transfer takes place by will, deed, or otherwise, but that it is the intention of all the parties to the transaction, presumed, if not expressed, that the transferee of the legal title is not to enjoy the beneficial ownership, but that he is to hold as trustee, as to the whole or a part of the estate, for the party whom the circumstances show to be the real beneficial owner. This description completely excludes the notion of fraud as a source of resulting trusts.

be a true *gift* so far as the immdiate transferee, A., is concerned, the instrument must not even state any consideration, and no valid complete trust must be declared in favor of A. or of any other person. Such trusts, therefore, generally arise from wills, although they may arise from deeds. If the conveyance be by a deed, the trust will result to the grantor; if it be by a will, the trust will result to the testator's residuary devisees or legatees, or to his heirs or personal representatives, according to the nature of the property and of the dispositions. (2) The second type includes the cases where a purchase has been made, and the legal estate is conveyed or transferred to A., but the purchase price is paid by B. I shall briefly examine these two forms.

§ 1032. **First Form; Trust Resulting to the Donor.**— This type includes the three following subdivisions: 1. Where property is conveyed by will or deed upon some particular trust or particular objects, and these purposes fail in whole or in part, or the particular trusts are so uncertain and indefinite that they can not be carried into effect, or they lapse, or they are illegal—in all of these cases a trust, either with reference to the whole property or to the residuum, results in favor of the grantor, or the heirs, residuary devisees or legatees, or personal representatives of the testator.[1] The following are illustrations: Where property is given by will or deed, stated to be *on trust*, but no trust is declared, or upon trusts thereafter to be declared, but no such declaration is made, or is given upon some trust which has wholly failed and become inoperative;[2] or when

[1] Aston v. Wood, L. R., 6 Eq. 419; Symes v. Hughes, Id., 9 Eq. 475; Cardigan v. Cruzon-Howe, Id., 9 Eq. 358; Richards v. Delbridge, Id., 18 Eq. 11; Wild v. Banning, Id., 2 Eq. 577; Fisk v. Att'y-Gen., Id., 4 Eq. 521; Longley v. Longley, Id., 13 Eq. 133; Haigh v. Kaye, Id., 7 Ch. 469; Biddulph v. Williams, Id., 1 Ch. D. 203; Pawson v. Brown, Id., 13 Ch. D. 202; Cruse v. Barley, 3 P. Wms. 20; Hill v. B'p of London, 1 Atk. 618–620; Robinson v. Taylor, 2 Bro. Ch. 589; Ripley v. Waterworth, 7 Ves. 425, 435; Stansfield v. Habergham, 10 Id. 273; Stubbs v. Sargon, 3 My. & Cr. 507; 2 Keen, 255; Gibbs v. Rumsey, 2 V. & B. 294; Ommaney v. Butcher, 1 T. & R. 260, 270; Wood v. Cox, 2 My. & Cr. 684; 1 Keen, 317; Fowler v. Garlike, 1 Russ. & M. 232; Nichols v. Allen, 130 Mass. 211; Olliffe v. Wells, 130 Id. 221; Easterbrooks v. Tillinghast, 5 Gray, 17; Straat v. Uhrig, 56 Mo. 482; Bennett v. Hutson, 33 Ark. 762; McCollister v. Willey, 52 Ind. 382; and see the following notes.

[2] Aston v. Wood, L. R., 6 Eq. 419; Symes v. Hughes, Id., 9 Eq. 475; Cardigan v. Cruzon-Howe, Id., 9 Eq. 358; Haigh v. Kaye, Id., 7 Ch. 469; Biddulph v. Williams, Id., 1 Ch. D. 203; Pawson v. Brown, Id., 13 Ch. D. 202; Brown v. Jones, 1 Atk. 188; Dawson v. Clark, 18 Ves. 247, 254; Morice v. B'p of Durham, 10 Id. 537; Pratt v. Sladden, 14 Id. 193, 198; Sidney v. Shelley, 19 Id. 352, 359; Collins v. Wakeman, 2 Id. 683; Dunnage v. White, 1 J. & W. 583; Southouse v. Bate, 2 V. & B. 396; Brookman v. Hales, 2 Id. 45; Woollett v. Harris, 5 Madd. 452; Att'y-Gen. v. Windsor, 8 H. L. Cas. 369; 24 Beav. 679; Gloucester v. Osborn, 1 H. L. Cas. 272; 3 Hare,

property is given upon a trust which is too uncertain, indefinite, and vague in its declaration to be carried into effect;[1] or if property is given upon a trust which is illegal, and therefore void;[2] or upon a trust which fails by lapse, and the property is not otherwise disposed of.[3]

§ 1033. **The Same; Essential Elements.**—In this and all other forms belonging to the class under present consideration, there must be no pecuniary consideration coming from the grantee, for such a consideration would raise a trust in his own favor, and clothe him with the beneficial interest. Even if the conveyance merely recites a pecuniary consideration, the same effect would be produced. Furthermore, the deed or will must contain no declaration of use covering the whole estate in favor of the grantee or devisee; such a declaration of use would raise a trust in his favor, vest in him the beneficial estate to its extent, and so far defeat any resulting trust. Resulting trusts of this type are matters of intention. There is a substantial distinction between giving property expressly *for* a particular purpose, and giving it only *subject to* a particular purpose.[4] If the intention appears from the whole instrument

131; Goodere v. Lloyd, 3 Sim. 538; Taylor v. Haygarth, 14 Id. 8; Flint v. Warren, 16 Id. 124, Coard v. Holderness, 20 Beav. 147; Fitch v. Weber, 6 Hare, 145; Onslow v. Wallis, 1 Macn. & G. 506; Barrs v. Fewkes, 2 Hem. & M. 60; Bennett v. Hutson, 33 Ark. 762; Russ v. Mebius, 16 Cal. 350; Sturtevant v. Jaques, 14 Allen, 523, 526; Shaw v. Spencer, 100 Mass. 382, 388.

[1] James v. Allen, 3 Meriv. 17; Leslie v. Duke of Devonshire, 2 Bro. Ch. 187; Stubbs v. Sargon, 3 My. & Cr. 507; 2 Keen, 255; Vezey v. Jamson, 1 S. & S. 69; Fowler v. Garlike, 1 Russ. & M. 232; Ellis v. Selby, 1 My. & Cr. 286; 7 Sim. 352; Kendall v. Granger, 5 Beav. 300; Williams v. Kershaw, 5 Cl. & Fin. 111; Nichols v. Allen, 130 Mass. 211; Olliffe v. Wells, 130 Id. 221; see Power v. Cassidy, 79 N. Y. 602.

[2] Richards v. Delbridge, L. R., 18 Eq. 11; Pawson v. Brown, Id., 13 Ch. D. 202; Gibbs v. Rumsey, 2 V. & B. 294; Carrick v. Errington, 2 P. Wms. 361; Arnold v. Chapman, 1 Ves. Sen. 108; Page v. Leapingwell, 18 Ves. 463; Jones v. Mitchell, 1 S. & S. 290; Cook v. Stationers' Co., 3 My. & K. 262; Pilkington v. Boughey, 12 Sim. 114; Russell v. Jackson, 10 Hare, 204; Dashiell v. Att'y-Gen., 6 Har. & J. 1; Stevens v. Ely, 1 Dev. Eq. 497; Lemmond v. Peoples, 6 Ired. Eq. 137.

[3] Ackroyd v. Smithson, 1 Bro. Ch. 503; Spink v. Lewis, 3 Id. 355; Hutcheson v. Hammond, 3 Id. 128; Williams v. Coade, 10 Ves. 500; Muckleston v. Brown, 6 Id. 52, 63; Davenport v. Coltman, 12 Sim. 588, 610; Hawley v. James, 5 Paige, 318. If the property, where the prior trust fails by lapse or otherwise, is given to some other person, then no trust results.

[4] The reason of this distinction lies wholly in the *intention or assumed intention* of the donor. When property is given to A. expressly *for* a specific purpose, the instrument showing a clear intention that the gift is *for that purpose alone*—e. g. land is given on trust to pay the grantor's debts—then as to so much of the property given as is not required for the expressed purpose, a trust results to the donor. On the other hand, when property is given to A., *subject only to* or *charged with*, a particular purpose, the gift is held to be absolute; a beneficial interest as well as the legal estate vests in the donee; and no trust results to the donor even though the special purpose wholly fails—much less when there is a residuum of the property left after it is accomplished.

that the donee is to take the beneficial interest, even though *subject* to the particular object or purpose designated, then no trust will result to the donor, if that object or purpose should fail.

§ 1034. **2. A Trust Declared in a Part only of the Estate Conveyed.**—A second subdivision includes those cases where the owner of both the legal and the equitable estates conveys the legal estate, but does not convey the equitable estate, or conveys only a portion of it, and a trust in the entire equitable estate in the one instance, or in the part of it undisposed of, in the other, will in general result to the grantor, or to the heirs or representatives of the testator.[1]

§ 1035. **3. In Conveyances without Consideration.**—It was a doctrine of the English equity, in pursuance of the ancient principle that the use followed or was raised by the consideration, that when land was conveyed by deed without any consideration, and without any use or trust being declared, a trust resulted to the feoffor, the feoffee taking only the naked legal title. This doctrine, however, had no application to conveyances which operated under

The case is completely analogous to a conveyance or bequest to A. of all the legal and beneficial interest in property, subject to or incumbered by a mortgage or any other kind of lien. It follows that where property is devised or bequeathed to A., *subject to* or *charged with* the payment of the testator's debts or legacies, A. takes the entire interest, subject only to the lien or charge, and there is no resulting trust. King v. Denison, 1 V. & B. 260, 272; Wood v. Cox, 2 My. & Cr. 684; Tregonwell v. Sydenham, 3 Dow, 194, 210. King v. Denison, *supra*, is the leading case illustrating this distinction. The court said: "If I give to A. and to his heirs all my real estate, *charged* with my debts, that is a devise to him for a particular purpose, but not for that purpose alone. If the devise to him is *on trust to pay my debts*, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just the difference; the former is a devise of an estate for the purpose of giving the devisee the beneficial interest, subject however to a particular purpose by way of charge; the latter is a devise for a particular purpose, *with no intention to give him any beneficial interest.*"

[1] As examples: property is conveyed, devised, or bequeathed, upon some particular trust which does not embrace the entire estate—as to A. in fee in trust for B. during his life—or the purposes of which do not exhaust the whole beneficial interest—e. g. in trust to pay the testator's debts, or some particular debts, or to pay some specified annuity—a trust in the residue will result; or a devise of *all* the testator's estate of every kind, upon trusts applicable only to personal property, a trust as to the real estate devised will result to the heirs. Longley v. Longley, L. R., 13 Eq. 133; Cottington v. Fletcher, 2 Atk. 155; Ellcock v. Mapp, 3 H. L. Cas. 492; 2 Phil. 793; Northen v. Carnegie, 4 Drew. 587; King v. Denison, 1 V. & B. 260, 272; Watson v. Hayes, 5 My. & Cr. 125; Dunnage v. White, 1 J. & W. 583; Lloyd v. Lloyd, L. R., 7 Eq. 458; Marshal v. Crutwell, Id., 20 Eq. 328; Parnell v. Hingston, 3 Sm. & Giff. 337, 344; Lloyd v. Spillet, 2 Atk. 149, 150; Hobart v. Countess of Suffolk, 2 Vern. 644; Davidson v. Foley, 2 Bro. Ch. 203; Benbow v. Townsend, 1 My. & K. 506; Halford v. Stains, 16 Sim. 488; Cooke v. Dealey, 22 Beav. 196; Sewell v. Denny, 10 Id. 315; Read v. Stedman, 26 Id. 495;

the statute of uses, since a use was raised in favor of the immediate grantee by a "bargain and sale" between strangers, and by a "covenant to stand seised" between relatives. If the doctrine has any existence under the conveyancing system of this country, so that a trust should result to the grantor from the absence of a consideration, it can only be where the deed simply contains words of grant or transfer, and does not recite nor imply any consideration, and does not in the *habendum* clause or elsewhere declare any use in favor of the grantee, and the conveyance is not in fact intended as a gift.[1]

McCollister v. Willey, 52 Ind. 382; Ponce v. McElvy, 47 Cal. 154, 159; Kennedy v. Nunan, 52 Id. 326; Loring v. Eliot, 16 Gray, 568; Hogan v. Jaques, 19 N. J. Eq. 123; Hogan v. Stayhorn, 65 N. C. 279.

[1] Gould v. Lynde, 114 Mass. 366, holds that no trust results to the grantor upon a warranty deed in the usual form, which recites a consideration, and contains a *habendum* to the grantee's use. Osborn v. Osborn, 29 N. J. Eq. 385 (no trust results upon a voluntary conveyance from a husband to his wife); Bragg v. Geddes, 93 Ill. 39; Stucky v. Stucky, 30 N. J. Eq. 546; Davis v. Baugh, 8 Pac. Law J. 903; Gerry v. Stimson, 60 Me. 186; Philbrook v. Delano, 29 Id. 410; Farrington v. Barr, 36 N. H. 86; Graves v. Graves, 29 Id. 129; Titcomb v. Morrill, 10 Allen, 15; Bartlett v. Bartlett, 14 Gray, 277; Cairns v. Colburn, 104 Mass. 274; Rathbun v. Rathbun, 6 Barb. 98, 105; Bank of U. S. v. Housman, 6 Paige, 526; Squire v. Harder, 1 Id., 494; Miller v. Wilson, 15 Ohio, 108.

The doctrine would doubtless apply under the special condition of facts described in the text. The case of Russ v. Mebius, 16 Cal. 350, contains an instructive discussion of the subject. The plaintiff C. R. was owner in fee of a certain lot of land; he conveyed the lot to his father, the only consideration being a verbal promise by the father to make a will and thereby devise to the plaintiff certain other property of a stipulated value. The father died still holding the lot, but without in any manner performing his agreement with the plaintiff—without bequeathing to him any property. The plaintiff brought this suit to establish a trust and to compel a reconveyance of the land. The court held that as the father's verbal agreement was void and unperformed, there was no consideration express or implied for the conveyance; and as it was clear that no gift was intended, a trust resulted in favor of the plaintiff, and he was entitled to have a conveyance to himself of the legal title. Mr. Justice Cope said (p. 355): "We are unable to see why the case does not fall within the doctrine as to resulting trusts. The agreement was void, and the conveyance was executed without any consideration express or implied. It is shown that the transaction was not intended as a gift, and as there was no consideration a trust resulted in favor of the plaintiff by implication of law" (quoting Story's Eq. §§ 1197, 1198). In discussing another aspect of the case the judge said: "It was stated on the argument that the conveyance from the plaintiff to his father did not express the real consideration for which it was given, but acknowledged the payment by the father of a nominal consideration in money. This is an important matter. If the statement was correct, parol evidence was inadmissible to establish the trust, and the plaintiff must eventually fail to obtain the relief which he asks (Story's Eq. § 1199). The doctrine of resulting trusts is founded upon a mere implication of law, and in general this implication can not be indulged in favor of the grantor where it is inconsistent with the presumptions arising from the deed. Unless there is some evidence of fraud or mistake, the recitals in the deed are conclusive upon the grantor, and no resulting trust can be raised in his favor in opposition to such express terms of a conveyance." The judge quoted the strong case of Leman v. Whitley, 4 Russ. 423, where a son had conveyed land to a father, upon no actual consideration but upon a mere

§ 1036. **Parol Evidence.**—In all the instances belonging to this first form of resulting trust, the intention that the donee is not to enjoy the beneficial interest but that a trust is to result, or the contrary intention, must appear expressly or by implication from the terms of the instrument itself by which the property is conveyed. If the instrument is a will then no extrinsic evidence is ever admissible to show the testator's meaning nor even to show a mistake.[1] If the instrument is a deed no extrinsic evidence of the donor's intention is admissible, unless fraud or mistake is alleged and shown. If therefore there is in fact no consideration, but the deed recites a pecuniary consideration even merely nominal as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence would be admitted to contradict the recital and to show that there is in fact no consideration—except in a case of fraud or mistake.[2]

§ 1037. **Second Form. Conveyance to A., Price Paid by B.**—In pursuance of the ancient equitable principle that the beneficial estate follows consideration and attaches to the party from whom the consideration comes,[3] the doctrine is settled in England and in a great majority of the American states, that where property is purchased and the conveyance of the legal title is taken in the name of one person A., while the purchase price is paid by another person B., a trust at once results in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him. In order that this effect may be produced, however, it is absolutely indispensable that the payment should be actually made by the beneficiary B., or that an absolute obligation to pay should be incurred by him, *as a part of the original transaction of purchase*, at or before the time of the conveyance; no subsequent and *en-*

temporary and verbal arrangement; but the deed recited and acknowledged a pecuniary consideration as paid by the father. After the father's death the son filed a bill to have a trust declared. The M. R. held that the recital of a pecuniary consideration raised a conclusive presumption that a beneficial interest was intended to be given to the grantee, and cut off the resulting trust in favor of the grantor; and parol evidence was not admissible in the absence of any fraud or mistake (which was not pretended) to show the falsity of the recital; see, also, to the same effect Squire v. Harder, 1 Paige, 494.

[1] See *ante*, § 871, cases in note.

[2] Leman v. Whitley, 4 Russ. 423; Russ v. Mebius, 16 Cal. 350; Squire v. Harder, 1 Paige, 494.

[3] See *ante*, § 981.

tirely independent conduct, intervention, or payment on his part would raise any resulting trust.[1]

§ 1038. **Special Rules.**—To the general doctrine are added the following more specific rules. The trust results whether the title is taken in the name of one grantee only, or of two or more grantees jointly; in the latter case there are joint trustees.[2] A trust also results in favor of one who pays only a part of the

[1] This description assumes that the conveyance to A. is made with the knowledge and consent, express or implied, of B., who pays the price—that the whole transaction is in pursuance of a common understanding or arrangement. If the conveyance is taken by A. secretly, contrary to B.'s wishes, in violation of a duty owed to him, or in fraud of his rights, the trust which arises in B.'s favor is not "resulting," but is "constructive." The two kinds are often confounded, but the distinction is important and especially so in those states where the "resulting" trusts of this form have been in terms abolished by statute. The leading case is Dyer v. Dyer, 2 Cox, 92; 1 Eq. Lead. Cas. 314, 319, 333 (4th Am. ed.); see notes of the English and American editors for a full collection of authorities. Lord Ch. B. Eyre laid down the general doctrine as follows: "The clear result of all the cases without a single exception is, that the trust of a legal estate, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successively, results to the man who advances the purchase money." See, also, Withers v. Withers, Ambl. 151; Wray v. Steele, 2 V. & B. 388; Loyd v. Read, 1 P. Wms. 607; Rider v. Kidder, 10 Ves. 360; Case v. Codding, 38 Cal. 191; Dikeman v. Norrie, 36 Id. 94; Roberts v. Ware, 40 Id. 634; Currey v. Allen, 34 Id. 254; Millard v. Hathaway, 27 Id. 119; Bayles v. Baxter, 22 Id. 575; Hidden v. Jordan, 21 Id. 92; Wasley v. Foreman, 38 Id. 90; Bludworth v. Lake, 33 Id. 255; Davis v. Baugh, 8 Pac. Law J. 903; Hutchinson v. Hutchinson, Id. 636; Lehman v. Lewis, 62 Ala. 129; Burks v. Burks, 7 Baxt. 353; Mathis v. Stufflebeam, 94 Ill. 481; Smith v. Patton, 12 W. Va. 541; Hampson v. Fall, 64 Ind. 382; Keller v. Kunkel, 43 Md. 565; Brooks v. Shelton, 54 Miss, 353; Boskowitz v. Davis, 12 Nev. 446; Du Val v. Marshall, 30 Ark. 230; Lee v. Browder, 51 Ala. 288; Billings v. Clinton, 6 S. C. 90; Sale v. McLean, 29 Ark. 612; Midmer v. Midmer's Ex'rs, 26 N. J. Eq. 299; Murphy v. Peabody, 63 Ga. 522; such a resulting trust may arise where a husband has paid for property with money belonging to his wife, and has taken the title in his own name, and where a parent has in like manner paid for property with money of his child and taken the conveyance to himself; but if the transaction is secretly done, in violation of a fiduciary duty, the trust would be constructive rather than resulting; see, as examples, Johnson v. Anderson, 7 Baxt. 251; Thomas v. Standiford, 49 Md. 181; Catherwood v. Watson, 65 Ind. 576 (but cut off by a sale to a *bona fide* purchaser); Loften v. Witboard, 92 Ill. 461; Tilford v. Torrey, 53 Ala. 120; Moss v. Moss, 95 Ill. 449 (but is cut off by a general release of all claims given to her husband); Cunningham v. Bell, 83 N. C. 328. In the following cases no trust resulted to the wife under the circumstances: Kenneday v. Price, 57 Miss. 771; Hause v. Hause, 57 Ala. 262; Bibb v. Smith, 12 Heisk, 728; McCullough v. Ford, 96 Ill. 439; Hon v. Hon, 70 Ind. 135. See also, as illustrations of the general doctrine, Kelley v. Jenness, 50 Me. 455; Baker v. Vining, 30 Id. 121, 126; Hopkinson v. Dumas, 42 N. H. 296; Hall v. Young, 37 Id. 134; Clark v. Clark, 43 Vt. 685; Kendall v. Mann, 11 Allen, 15; Dean v. Dean, 6 Conn. 285; Boyd v. McLean, 1 Johns. Ch. 582; Cutler v. Tuttle, 19 N. J. Eq. 549, 558; Nixon's Appeal, 63 Pa. St. 279; Stewart v. Brown, 2 Serg. & R. 461; Cecil Bank v. Snively, 23 Md. 253; McGovern v. Knox, 21 Ohio St. 547, 551; Milliken v. Ham, 36 Ind. 166; Latham v. Henderson, 47 Ill. 185; Johnson v. Quarles, 46 Mo. 423; McLenan v. Sullivan, 13 Iowa, 521; Rogan v. Walker, 1 Wisc. 527; Frederick v. Haas, 5 Nev. 389.

[2] *Ex parte* Houghton, 17 Ves. 251, 253; Rider v. Kidder, 10 Id. 360, 367.

price. In other words, where two or more persons together advance the price, and the title is taken in the name of one of them, a trust will result in favor of the other with respect to an undivided share of the property proportioned to his share of the price.[1] The doctrine in all of its phases applies alike to personal and to real property.[2]

§ 1039. **Purchase in the Name of a Wife or Child.**— Wherever the real purchaser—the one who pays the price—is under a legal, or, even in some cases, a moral obligation to maintain the person in whose name the purchase is made, equity raises the presumption that the purchase is intended as an advancement or gift to such recipient, and no trust results. If, therefore, a purchase of either real or personal property is made by a husband in the name of his lawful wife, or in the joint names of himself and his wife, or such a purchase is made by a father in the name of his legitimate child, or in the joint names of himself and child, no trust results in favor of the husband or father, but the transaction is presumed to be a gift or advancement to or for the benefit of the wife or child.[3] It appears to be now settled that the same rule applies to a mother who purchases property in the name of her child, or in the joint names of herself and child, and pays the price with her own separate funds; no trust results.[4] The rule also ap-

[1] Wray v. Steele, 2 V. & B. 388; Case v. Codding, 38 Cal. 191; Dikeman v. Norrie, 36 Id. 94; McCreary v. Casey, 50 Id. 349; Miller v. Birdsong, 7 Baxt. 531; Cramer v. Hoose, 93 Ill. 503; Smith v. Patton, 12 W. Va. 541; Rhea v. Tucker, 56 Ala. 450; Smith v. Smith, 85 Ill. 189.

[2] Where a bond, or shares of stock, or annuity, or any other thing in action, or kind of personal property, is assigned to one person, a trust therein will result in favor of another who advances the consideration of the transfer in whole or in part. Loyd v. Read, 1 P. Wms. 607; *Ex parte* Houghton, 17 Ves. 251, 253; Rider v. Kidder, 10 Ves. 360; Soar v. Foster, 4 K. & J. 152; Beecher v. Major, 2 Dr. & Sm. 431; Garrick v. Taylor, 29 Beav. 79; 7 Jur. N. S. 1174; Sidmouth v. Sidmouth, 2 Beav. 447, 454; and cases under last paragraph.

[3] Kingdon v. Bridges, 2 Vern. 67; Rider v. Kidder, 10 Ves. 360; Drew v. Martin, 2 Hem. & M. 130; Devoy v. Devoy, 3 Sm. & Giff. 403; Soar v. Foster, 4 K. & J. 152 (must be a lawful wife); Dyer v. Dyer, 2 Cox 92; Finch v. Finch, 15 Ves. 43, 50; Murless v. Franklin, 1 Sw. 13, 17, 18; Grey v. Grey, 2 Sw. 594, 597; Tucker v. Burrow, 2 Hem. & M. 515, 524; Williams v. Williams, 32 Beav. 370; Christy v. Courtenay, 13 Id. 96; Sidmouth v. Sidmouth, 2 Id. 447; Low v. Carter, 1 Id. 426; Vance v. Vance, 1 Id. 605; Sayre v. Hughes, L. R., 5 Eq. 376; *In re* Curteis' Trusts, Id., 14 Eq. 217; Marshal v. Crutwell, Id., 20 Eq. 328 (where a trust did result upon a bank account being transferred into names of husband and wife merely for convenience); Stevens v. Stevens, 70 Me. 92; Lorentz v. Lorentz, 14 W. Va. 809; Lochenour v. Lochenour, 61 Ind. 595; Baker v. Baker, 22 Minn. 262; Norton v. Mallory, 3 Thomp. & C. 640; Gilbert v. Gilbert, 2 Abb. App. Dec. 256; Farrell v. Lloyd, 69 Pa. St. 239.

[4] *In re* De Visme, 2 De G. J. & S. 17 (holds that a trust did result); Sayre v. Hughes, L. R., 5 Eq. 376, 381; Batstone v. Salter, Id., 19 Eq. 250; 10 Ch. 431; Fowkes v. Pascoe, Id., 10 Ch. 343; but see, *per contra*, Flynt v. Hubbard, 57 Miss. 471.

plies where the person advancing the price has placed himself *in loco parentis* towards the other.[1]

§ 1040. **Admissibility of Parol Evidence.**—Since these resulting trusts are not embraced within the statute of frauds, their existence need not be evidenced by any writing, and may, therefore, be established by parol. In cases belonging to the first form—purchases between strangers—if the deed does not show on its face that the price was actually paid by another, and even, according to many decisions, if the deed recites that the payment was made by the grantee therein, the real fact may always be established by parol evidence; it may be proved by parol that the purchase price was wholly or partly paid by another person, and thus a trust may be shown to result in his favor. Where the trust does not appear on the face of the deed or other instrument of transfer, a resort to parol evidence is indispensable. It is settled by a complete unanimity of decision, that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt. Where the payment of a part only, is claimed, the evidence must show, in the same clear manner, the exact portion of the whole price which was paid.[2] Parol evidence is also admissible on the part of the grantee to

[1] Beckford v. Beckford, Lofft, 490 (father and illegitimate son); Ebrand v. Dancer, 2 Chan. Cas. 26 (grandfather and grandchild); Currant v. Jago, 1 Coll. 261 (husband and wife's nephew); Higdon v. Higdon, 57 Miss. 264 (brother and his sisters); Loyd v. Read, 1 P. Wms. 607; Forrest v. Forrest, 11 Jur., N. S., 317; Sayre v. Hughes, L. R., 5 Eq. 376, 380; Smith v. Patton, 12 W. Va. 541; but in Tucker v. Burrow, 2 Hem. & M. 515, V. C. Page Wood held that the mere fact that a person had placed himself *in loco parentis* towards the illegitimate son of his daughter, did not alone bring a purchase made in the name of such illegitimate grandson within this rule which prevents a resulting trust. He said: "The court has never held that any presumption of advancement arose merely from the fact of so distant a relationship (if it be a relationship) as this, nor yet *merely* from the fact that one of the parties was *in loco parentis* to the other."

[2] A few of the earliest decisions did not permit such evidence, on the ground that it would violate the statute of frauds, but they have long been overruled. Several of the cases cited below are examples of what kind and amount of parol evidence is or is not sufficient to raise a trust, and also when such a trust may be shown by circumstantial evidence alone. Gascoigne v. Thwing, 1 Vern. 366; Bartlett v. Pickersgill, 1 Eden, 515; Ryall v. Ryall, 1 Atk. 59; Willis v. Willis, 2 Atk. 71; Lench v. Lench, 10 Ves. 511, 517; Groves v. Groves, 3 Y. & J. 163; Heard v. Pilley, L. R., 4 Ch. 548, 552; Whitmore v. Learned, 70 Me. 276; Parker v. Snyder, 31 N. J. Eq. 164; Agric. etc. Assoc. v. Brewster, 51 Tex. 257; Miller v. Blose's Ex'r, 30 Gratt. 744; Smith v. Patton, 12 W. Va. 541; Rhea v. Tucker, 56 Ala. 450; Hyden v. Hyden, 6 Baxt. 406; Lee v. Browder, 51 Ala. 288; Billings v. Clinton, 6 S. C. 90; Hennessey v. Walsh, 55 N. H. 515 (evidence insufficient); McCreary v. Casey, 50 Cal. 349; Murphy v. Peabody, 63 Ga. 522; Byers v. Wackman, 16 Ohio St. 440; Frederick v. Haas, 5 Nev. 389; Boyd v. McLeah, 1 Johns. Ch. 582, 586; Page v. Page, 8 N. H. 187, 195; Baker v. Vining, 30 Me. 121, 126; Thomas v. Standiford, 49 Md. 181.

defeat a trust. Since the whole doctrine of a resulting trust depends upon an equitable presumption of an intention, so this presumption may be overcome by parol evidence of an actual intention on the part of the one paying the price, that the transaction was to be a gift.[1]

§ 1041. **The Same; Between Family Relatives.**—In trusts of the second form—between family relatives—no evidence is necessary in the first instance to show the operation of the rule, since a presumption arises on the face of the transaction that a gift was intended and that no trust results. This result, however, is merely a presumption, and may be overcome. Extrinsic evidence, either written or parol, is admissible on behalf of the husband or parent paying the price to rebut the presumption of an advancement or gift, and to show that a trust results; and conversely such evidence may be used to fortify and support the presumption. In general this extrinsic evidence to defeat an advancement and establish a trust, as against the party to whom the property is conveyed or transferred, and those holding under him, must consist of matters *substantially contemporaneous* with the purchase, conveyance, or transfer, so as to be fairly connected with the transaction.[2]

§ 1042. **Legislation of Several States.**—The second form of resulting trusts in real property, above described, where the

[1] Of course a gift may be made between strangers, and may be made in the form of a purchase of property conveyed to A., the donee, while the donor, B., pays the price. Whenever this condition of fact is shown by the evidence, no trust can result. Lane v. Dighton, Ambl. 409; Bellasis v. Compton, 2 Vern. 294; Benbow v. Townsend, 1 My. & K. 506; Deacon v. Colquhoun, 2 Drew. 21; Beecher v. Major, 2 Dr. & Sm. 431; Garrick v. Taylor, 29 Beav. 79; 7 Jur., N. S., 1174; Wheeler v. Smith, 1 Giff. 300; Carter v. Montgomery, 2 Tenn. Ch. 216; and the presumption may thus be rebutted as to a part of the trust and not as to the remainder. Rider v. Kidder, 10 Ves. 360, 368; Benbow v. Townsend, 1 My. & K. 506.

[2] Kilpin v. Kilpin, 1 My. & K. 520; Lamplugh v. Lamplugh, 1 P. Wms. 111, 113; Hall v. Hill, 1 Dr. & War. 94, 114; Murless v. Franklin, 1 Sw. 13; Tucker v. Burrow, 2 Hem. & M. 515, 524; Sidmouth v. Sidmouth, 2 Beav. 447, 455; Williams v. Williams, 32 Id. 370; Dumper v. Dumper, 3 Giff. 583; Devoy v. Devoy, 3 Sm. & Giff. 403; Stevens v. Stevens, 70 Me. 92.

What facts are sufficient or not to rebut the presumption of an advancement or gift, and to establish a resulting trust, is a question frequently considered by the English cases. The following have been held *not sufficient:* possession of the estate and receipt of its rents by the father during his life, after conveyance to his child, Lamplugh v. Lamplugh, 1 P. Wms. 111; Taylor v. Taylor, 1 Atk. 386; Christy v. Courtenay, 13 Beav. 96; nor receipt by the father of the dividends of investments made in the name of his son, Sidmouth v. Sidmouth, 2 Beav. 447; but see Smith v. Warde, 15 Sim. 56; nor a devise, bequest, or lease of the property by the husband or parent after the purchase, Crabb v. Crabb, 1 My. & K. 511; Dummer v. Pitcher, 2 Id. 262; Jeans v. Cooke, 24 Beav. 513; Murless v. Franklin, 1 Sw. 13.

title to land is taken in the name of one person and the price is paid by another, has been abolished by the legislation of several states.[1] In pursuance of these statutes, which follow substantially a common type in all these states, no trust ever results in favor of the one who pays the purchase price, wholly or partly, where the title is with his knowledge taken in the name of another person; but in place thereof, a trust arises in favor of the creditors of the one thus paying or advancing the price. This provision does not, however, include the cases where the grantee takes the deed in his own name without the knowledge and consent of the person paying the money, nor where the purchase is made in his own name with another's money, in violation of some duty or confidence; in these instances the trust, which is then really constructive rather than resulting, still arises. All of these statutes seem to be confined in their terms to conveyances of real property, so that the settled rules concerning resulting trusts in personal property appear to be left

[1] *New York.*—R. S., pt. 2, ch. 1, art. 6, §§ 51, 52, 53; vol. 2, p. 1105 (ed. of 1875), § 51. "Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section." § 52. "Every such conveyance shall be presumed fraudulent as against the creditors at that time of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands." § 53. "The provisions of the preceding § 51 shall not extend to cases where the alience named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person."

Michigan.—Comp. Laws (1871), vol. 2, p. 1331, § 7, same as New York, § 51; § 8, same as New York, § 52, except the words "at that time" are omitted; § 9, same as New York, § 53.

Minnesota.—Statutes (Young's ed. 1880), p. 553, §§ 7, 8, and 9, same as New York, §§ 51, 52, 53.

Wisconsin.—R. S. (Taylor's ed. 1872), vol. 2, p. 1129, § 7, same as New York, § 51; § 8, same as New York, § 52, except the words "at that time" are omitted; § 9, same as New York, § 53.

Kansas.—Comp. Laws (Dassler's ed. 1881), p. 989, § 6, same as New York § 51; § 7, substantially the same as New York, § 52, except that it extends to subsequent as well as prior creditors if the fraudulent intent is shown; § 8, provides that the preceding § 6 shall not apply to the same cases described in New York, § 53, and then adds the following case: "Or where it shall be made to appear that, by agreement and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein, in trust for the party paying the purchase money, or some part thereof."

Indiana.—Statutes (ed. of 1876), vol. 1, p. 915, §§ 6, 7, and 8, same as the Kansas §§ 6, 7, 8.

Kentucky.—Gen. Stat. (1873), p. 587, § 19, substantially same as New York, § 51. The *Georgia* Code (1873), p. 400, § 2316, defines "implied" trusts—resulting and constructive—but without altering the doctrines of equity as generally settled, simply declaratory of existing rules.

untouched. They also relate solely to the second form of resulting trusts, as heretofore described, so that the instances of the first form, where a trust results to the grantor, remain unaltered, and the rules concerning them in full force. In construing the first and main clause of the statute which abolishes the resulting trust in favor of the person paying the price, it is thoroughly settled by the New York courts that the provision implies his consent and co-operation in the mode of transfer, so that he in fact induces the conveyance of the title to the grantee, and that it does not apply unless he were aware that the conveyance was so made, and the title was so taken. This seems to be the correct construction of the provision which is the same in all the statutes.[1] With regard to the true interpretation of the clause creating a trust in favor of the creditors of the person paying the price, there has been some conflict among the decisions and *dicta* of the New York courts.[2] Cases arising under the similar statutory provisions of the other states are collected in the foot-note.[3]

[1] Reitz v. Reitz, 80 N. Y. 538; reversing S. C., 14 Hun, 536; Lounsbury v. Purdy, 18 N. Y. 515; Day v. Roth, Id. 448; Siemon v. Schurck, 29 Id. 598, 610; Traphagen v. Burt, 67 Id. 30; Underwood v. Sutcliffe, 77 Id. 58; thus it is held that where a father paid the price and had a conveyance made to a third person, the purchase being intended for the benefit of a child and as an advancement, the whole transaction being completed without the child's knowledge, a trust resulted in favor of such child. Siemon v. Schurck, *supra;* 33 Barb. 9; Gilbert v. Gilbert, 2 Abb. App. Dec. 256.

[2] The earlier cases regarded the clause as creating a pure trust in favor of the creditors, which they could enforce simply as *cestuis que trustent,* without taking any legal proceedings against their debtor. Garfield v. Hatmaker, 15 N. Y. 475; Wood v. Robinson, 22 Id. 564; McCartney v. Bostwick, 32 Id. 53; 31 Barb. 390. The later decisions hold that only judgment creditors can reach the land by ordinary creditors' suit after having exhausted their legal remedies against the debtor. Ocean Nat. B'k v. Olcott, 46 N. Y. 12; Dunlap v. Hawkins, 59 Id. 342; 2 T. & C. 292.

[3] *Michigan.*—Munch v. Shabel, 37 Mich. 166; Weare v. Linnell, 29 Id. 224; Linsley v. Sinclair, 24 Id. 380; Fisher v. Fobes, 22 Id. 454; Jackson v. Cleveland, 15 Id. 94; Groesbeck v. Seeley, 13 Id. 329; Maynard v. Hoskins, 9 Id. 485; Trask v. Green, Id. 358.

Minnesota.—Baker v. Baker, 22 Minn. 262; Rogers v. McCauley, Id. 384; Matthews v. Torinus, Id. 132; Johnson v. Johnson, 16 Id. 512; Durfee v. Pavitt, 14 Id. 424; Gorton v. Massey, 12 Id. 145; Foster v. Berkey, 8 Id. 351; Baker v. Terrell, Id. 195; Sumner v. Sawtelle, Id. 309; Irvine v. Marshall, 7 Id. 286; Wentworth v. Wentworth, 2 Id. 277.

Kentucky.—Ewing v. Bibb, 7 Bush, 654; Martin v. Martin, 5 Id. 47; Graves v. Graves, 3 Metc. 167; Lindsay v. Williams' Ex'rs, 2 Duv. 475; Aynesworth v. Haldeman, Id. 565.

Kansas.—There is one marked difference between the statutes of Kansas and Indiana and those of the other states. While the *presumption* of a resulting trust in favor of the one paying the money is abrogated, it seems that such trust may be created by *express agreement* between the person taking the conveyance to himself and the person paying the price, even though this agreement is parol. Kennedy v. Taylor, 20 Kans. 558; Mitchell v. Skinner, 17 Id. 563; Franklin v. Colley, 10 Id. 260; Lyons v. Bodenhamer, 7 Id. 455; Morrall v. Waterson, Id. 199; Winkfield v. Brinkman, 21 Id. 682.

Indiana.—Derry v. Derry, 74 Ind.

§ 1043. **Interest and Rights of the Beneficiary.**—The interest of the *cestui que trust* in a resulting trust is not a mere "equity;" it is an equitable estate in the land or other thing of which the legal title is vested in the trustee; and as such it may be conveyed, transferred, devised, or otherwise dealt with as property.[1] It is valid and may be enforced not only against the trustee, but against his heirs, devisees, personal representatives, and all others who derive title from him as volunteers or purchasers with notice; but being a purely equitable interest, it is cut off and destroyed as against all *bona fide* purchasers or mortgagees from the trustee for a valuable consideration and without notice.[2] The *cestui que trust* is entitled to the remedy of compelling a conveyance or assignment of the legal estate to himself by the trustee, or perhaps in some instances of compelling the trustee to hold the property for the benefit of the beneficiary, and subject to his power of enjoyment, control, and disposition.[3]

§ 1044. **Second. Constructive Trusts.**—Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to

560; Hon v. Hon, 70 Id. 135; McCollister v. Willey, 52 Id. 382; Tracy v. Kelley, Id. 535; Hampson v. Fall, 64 Id. 382; Lochenour v. Lochenour, 61 Id. 595; Milliken v. Ham, 36 Id. 166; Hubble v. Osborn, 31 Id. 249; Gaylord v. Dodge, Id. 41; Glidewell v. Spaugh, 26 Id. 319; McDonald v. McDonald, 24 Id. 68; Catherwood v. Watson, 65 Id. 576.

Georgia.—I add some illustrations of the Georgia code concerning implied trusts, although it does not at all follow the New York type described in the text. Resulting trusts; Houser v. Houser, 43 Ga. 415; Street v. Lynch, 38 Id. 631; McKinney v. Burns, 31 Id. 295; Chastain v. Smith, 30 Id. 96; Gordon v. Green, 10 Id. 534; Williams v. Turner, 7 Id. 348; Pitts v. Bullard, 3 Kelly, 5; Constructive trusts, Brown v. Crane, 47 Ga. 483; Alexander v. Alexander, 46 Id. 283; Adams v. Jones, 39 Id. 479, 508; Cameron v. Ward, 8 Id. 245.

[1] Stump v. Gaby, 2 De G. M. & G. 623; 630; Gresley v. Mousley, 4 De G. & J. 78, 90, 92; Uppington v. Bullen, 2 Dr. & War. 184; Dickinson v. Burrell, L. R., 1 Eq. 337; Morgan v. Holford, 1 Sm. & Giff. 101; Malin v. Malin, 1 Wend. 625; Clapper v. House, 6 Paige, 149; Cogswell v. Cogswell, 2 Edw. Ch. 231; McKissick v. Pickle, 4 Harris, 140; Kent v. Mahaffey, 10 Ohio St. 204; Kane Co. v. Herrington, 50 Ill. 232.

[2] Lehman v. Lewis, 62 Ala. 129; Flynt v. Hubbard, 57 Miss. 471; Catherwood v. Watson, 65 Ind. 576; McClure v. Doak, 6 Baxt. 364 (postponed to the lien of a judgment recovered against the trustee); Haggard v. Benson, 3 Tenn. Ch. 268; Hampson v. Fall, 64 Ind. 382; King v. Pardee, 6 Otto, 90 (in Pennsylvania a resulting trust in land is barred by a delay of twenty-one years in enforcing it); Baker v. Hardin, 10 Heisk. 300 (not affected by judgments against the trustee); Moss v. Moss, 95 Ill. 449 (resulting trust in favor of a wife barred by a general release of all claims and demands given by her to her husband); Roy v. McPherson, 11 Neb. 197 (resulting trust in favor of a wife postponed to the liens of judgments against her husband).

[3] Millard v. Hathaway, 27 Cal. 119; Maloy v. Sloan, 44 Vt. 311.

the intention of the one holding the legal title, and where there is no express or implied, written or verbal declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed *trusts in invitum;* and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly "constructive." An exhaustive analysis would show, I think, that all instances of constructive trusts properly so called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. Even in that single class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser *intended* to act in pursuance of his fiduciary duty, the notion of fraud is not invoked simply because it is not absolutely necessary under the circumstances; the existence of the trust in all cases of this class might be referred to constructive fraud.[1] This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud.[2] Courts of equity, by thus extending the fundamental

[1] I refer to the class of cases where a trustee uses trust funds to pay for property purchased in his own name; equity assumes that he intended to act in accordance with his fiduciary duty, although in the majority of such instances the actual intention is undoubtedly to violate the duty. It will be seen that in my opinion certain kinds of so-called trusts which are often spoken of as "constructive" do not at all belong to that class.

[2] The effect of actual or constructive fraud in producing these trusts is well described in Mr. Perry's treatise, § 166: "If one party procures the legal title to property from another by fraud, misrepresentation, or concealment; or if a party makes use of some influential or confidential relation which he holds towards the owner of the legal title, to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee. If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the property in the hands of the offending

principle of trusts—that is, the principle of a division between the legal estate in one and the equitable estate in another—to all cases of actual or constructive fraud and breaches of good faith, are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property; they can follow the real owner's specific property, and preserve his real ownership, although he has lost or even never had the legal title, and can thus give remedies far more complete than the compensatory damages obtainable in courts of law. The principle is one of universal application; it extends alike to real and to personal property, to things in action, and funds of money. Salutary and efficient as the principle is, however, many of the constructive trusts which it creates are only trusts *sub modo;* they have little resemblance in their essential nature to express trusts.[1] In applying this principle, care should be taken to distinguish between actual trusts and those relations which are only trusts by way of metaphor, between persons who are true trustees holding the legal title for a beneficial *owner;* and those who simply occupy a position which is analogous in some respects to that of a trustee. The use of these terms to designate relations and parties which have no essential element in common with actual trusts and trustees, can only produce confusion and inaccuracy.[2]

party, and will convert him into a trustee of the legal title, and will order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party who is the beneficial owner."

See Jenckes v. Cook, 9 R. I. 520; McLane v. Johnson, 43 Vt. 48; Collins v. Collins, 6 Lans. 368; Thompson v. Thompson, 16 Wisc. 91; Pillow v. Brown, 26 Ark. 240.

[1] The language of Lord Westbury on this point in Rolfe v. Gregory, 4 De G. J. & S. 576, 579, is very instructive. The case was one where a person had fraudulently obtained trust property; but the remarks will apply to all such constructive trusts based upon actual fraud: "When it is said that the person who fraudulently receives or possesses himself of trust property is converted by this court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust."

[2] The distinction is clearly stated by Lord Westbury in Knox v. Gye, L. R., 5 H. L. 656, 675. It was argued, according to the common mode of expression, that a surviving partner is a trustee of the share of his deceased partner; but the Lord Chancellor referred to the case of the vendor and vendee of land, and said that although the vendor might by a metaphor be called a trustee for the vendee, *he was trustee only to the extent of his obligation to perform the agreement* between himself and the vendee, and proceeded as follows: "In like manner here the surviving partner may be called trustee for the dead man, *but the trust is limited to the discharge of the obligation,* which is liable to be barred by the lapse of time. As between the express trustee and *cestui que trust,* time will not run, but the surviving partner is not a trustee in that full and proper sense. It is most important to mark this again and again, *for there is not a more fruitful source of error in law than the inaccuracy of language.* The application to a man who is improperly and by metaphor only called a trustee, of all the consequences which would follow

§ 1045.—**Kinds and Classes.**—The specific instances in which equity impresses a constructive trust are numberless, as numberless as the modes by which property may be obtained, through bad faith and unconscientious acts. It is possible, however, to distinguish and describe the general groups or types under which all these instances may be arranged, and thus to present a comprehensive view of the whole subject.

§ 1046. **1. Arising from Contract, Express or Implied.** There are certain relations which are often spoken of as trusts and as constituting a species of constructive trusts, but which are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor. Since they lack the element of fraud, they do not, in any view, properly belong to the division of constructive trusts.[1] It is commonly said that a trust is created by a contract for the sale of land; that the vendor holds the legal title as a trustee for the purchaser. Whatever of truth there is in this mode of statement, whatever of a real trust relation exists, it certainly has nothing in common with constructive trusts; it rather resembles an express trust.[2] In like manner the survivors of a partnership are called trustees for the estate of the deceased partner, with respect to his share of the firm property. This expression is mostly metaphorical; there is certainly nothing in the relation resembling a constructive trust.[3] Extending the analogy still further, courts regard partnership property, after an insolvency or dissolution of the firm and in the proceeding for winding up its

if he were a trustee by express declaration—in other words, a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Macclesfield, that nothing in law is so apt to mislead as a metaphor."

[1] There is a tendency among writers to enlarge the meaning of the word trust beyond its legitimate signification. By some, the various equitable liens and similar rights arising from contract, are made to be the most important, and with a very few exceptions, the only instances of constructive trusts. As Lord Westbury shows, such a mode of treatment can produce nothing but confusion. The cases included in the first subdivision of the text are not constructive trusts, and are mentioned simply for purposes of completeness, and to distinguish between correct and mistaken conceptions.

[2] See *ante*, vol. 1, §§ 368, 372; Coman v. Lakey, 80 N. Y. 345, 350; Pelton v. Westchester Fire Ins. Co., 77 Id. 605, 607; Hensler v. Sefrin, 19 Hun, 564; Felch v. Hooper, 119 Mass. 52; Musham v. Musham, 87 Ill. 80. In the face of the great number of decisions and opinions by the ablest courts, it would be impossible to assert that the vendor is not truly a trustee; but he is a trustee only to a partial extent, measured by his obligation. It is plain that this trust arises from the express contract, is included within its terms by the interpretation of equity; it therefore resembles those express trusts which are inferred from the entire provisions of an instrument.

[3] See Knox v. Gye, L. R., 5 H. L. 656, 675, *per* Lord Westbury.

affairs, as a trust fund for the benefit of the firm creditors;[1] and the capital stock and other property of private corporations, especially after their dissolution, is treated as a trust fund in favor of creditors.[2] These statements may be sufficiently accurate as strong modes of expressing the doctrine that such property is a fund sacredly set apart for the payment of partnership and corporation creditors, before it can be appropriated to the use of the individual partners or corporators, *and that the creditors have a lien upon it* for their own security; but it is plain that no *constructive* trust can arise in favor of the creditors unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property, and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means.[3] I have thus collected the instances which are sometimes, though improperly classed with constructive trusts, in order the more clearly to indicate the nature of the trusts which are truly constructive, and which are described in the following paragraphs.

§ 1047. **2. Money Received which Equitably Belongs to Another.**—By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he can not in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or violation of fiduciary duty, and the like. It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit;[4] but in many instances a resort to the equitable jurisdiction is proper and even necessary.[5]

§ 1048. **3. Acquisition of Trust Property by a Volunteer, or Purchaser with Notice.**—Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or

[1] Campbell v. Mullett, 2 Sw. 551, 574; West v. Skip, 1 Ves. Sen. 239, 456; *Ex parte* Ruffin, 6 Id. 119, 126; Murray v. Murray, 5 Johns. Ch. 60; Young v. Frier, 1 Stockt. Ch. 465.

[2] Wood v. Dummer, 3 Mason, 308; Mumma v. Potomac Co., 8 Peters, 281, 286; Vose v. Grant, 15 Mass. 505, 517, 522; Spear v. Grant, 16 Id. 9, 15; Lyman v. Bonney, 101 Id. 562; Brewer v. Boston Theatre, 104 Id. 378; Goodin v. Cincinnati etc. Co., 18 Ohio St. 169; Bartlett v. Drew, 57 N. Y. 587; 60 Barb. 648; Hastings v. Drew, 76 N. Y. 9; Tinkham v. Borst, 31 Barb. 407.

[3] Hastings v. Drew, 76 N. Y. 9, 16; Bartlett v. Drew, 57 Id. 587; 60 Barb. 648.

[4] See Frue v. Loring, 120 Mass. 507, a decision based upon the narrow and statutory jurisdiction of the Massachusetts courts, and not in harmony with the general doctrines of equity.

[5] Com. Dig. Chancery, 2 A. 1; 2 Fonbl. Eq., B. 2, c. 1, § 1, n. (b.)

transferred by the trustee not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a *bona fide* purchaser for a valuable consideration and without notice. This universal rule forms the protection and safeguard of the rights of beneficiaries in all kinds of trust; it enables them to follow trust property—lands, chattels, funds of securities, and even of money—as long as it can be identified into the hands of all subsequent holders who are not in the position of *bona fide* purchasers for value and without notice; it furnishes all those distinctively equitable remedies which are so much more efficient in securing the beneficiary's rights than the mere pecuniary recoveries of the law.[1] Even when the original property is placed

[1] Adair v. Shaw, 1 Sch. & Lef. 243, 262; Rolfe v. Gregory, 4 De G. J. & S. 576; Leigh v. Macauley, 1 Y. & C. Ex. 260, 265, 266; Smith v. Barnes, L. R., 1 Eq. 65; Boursot v. Savage, Id., 2 Id. 134; Newton v. Newton, Id., 6 Id. 135; Heath v. Crealock, Id., 18 Id. 215; *In re* European B'k, Id., 5 Ch. 358, 362; *Ex parte* Cooke, Id., 4 Ch. D. 123; *In re* Hallett's Estate, Id., 13 Id. 696; Lane v. Dighton, Ambl. 409; Mansell v. Mansell, 2 P. Wms. 678; Lench v. Lench, 10 Ves. 511; Lewis v. Madocks, 17 Id. 48, 56; Pennell v. Deffell, 4 De G. M. & G. 372, 388; Mayor etc. v. Murray, 7 Id. 497; Ernest v. Croysdill, 2 De G. F. & J. 175; Griffin v. Blanchar, 17 Cal. 70; Sharp v. Goodwin, 51 Id. 219; Scott v. Umbarger, 41 Id. 410; Price v. Reeves, 38 Id. 457; Siemon v. Schurck, 29 N. Y. 598; Swinburne v. Swinburne, 28 Id. 568; Stephens v. B'd of Education, 79 Id. 183 (trust moneys paid by trustee to his creditor in discharge of an antecedent debt, but without notice of the trust, can not be followed by the beneficiary); Holden v. N. Y. & Erie Bank, 72 Id. 286; Newton v. Porter, 69 Id. 133, 137, 139; Dotterer v. Pike, 60 Ga. 29; Musham v. Musham, 87 Ill. 80; Phelps v. Jackson, 31 Ark. 272; Veile v. Blodgett, 49 Vt. 270; Dey v. Dey, 26 N. J. Eq. 182; Mercier v. Hemme, 50 Cal. 606; Boyd v. Brinckin, 55 Cal. 427; Planters' Bank v. Prater, 64 Ga. 609; McVey v. McQuality, 97 Ill. 93; Burnett v. Gustafson, 54 Iowa, 86 (moneys paid to a creditor in discharge of an antecedent debt, but without notice of any trust, can not be followed); Michigan etc. R. R. v. Mellen, 44 Mich. 321; Winona etc. R. R. v. St. Paul etc. R. R., 26

beyond the reach of the beneficiary by a sale to a *bona fide* purchaser for value and without notice, the trust, as will more fully appear hereafter, attaches to the proceeds in the hands of the trustee who makes the transfer. The statement and grounds of the rule show that it does not extend to the case where the property is duly transferred or purchased in pursuance of an express trust to convey or sell, and for the purpose of carrying such trust into effect. And where the rule does apply, there is some distinction between money and other kinds of trust property. If a trustee or other fiduciary person, in violation of his own duty, uses trust money to pay an antecedent debt of his own to a creditor who has no notice of the breach of trust, or that the money is subject to the trust, in such a manner that the money is received as a general payment and not as a distinct and separate fund, then the money becomes free from the trust, and can not be followed by the beneficiary into the hands of the creditor, although in general an antecedent debt does not constitute a valuable consideration.[1]

§ 1049. **Fiduciary Persons Purchasing Property with Trust Funds.**—Another important form of the trust arises from the acts of persons already possessing some fiduciary character or standing in some fiduciary relation. Whenever a trustee or other person in a fiduciary capacity, acting apparently within the scope of his powers—that is, having authority to do what he does—purchases property with trust funds, and takes the title thereto in his own name, without any declaration of trust, a trust arises with respect to such property in favor of the *cestui que trust* or other beneficiary. Equity regards such a purchase as made in trust for the person beneficially interested, independently of any imputation of fraud, and without requiring any proof of an intention to violate the existing fiduciary obligation, because it assumes that the purchaser intended to act in pursuance of his fiduciary duty, and not in violation of it. This doctrine is of wide application; it extends to trustees, executors and administrators, directors of corporations, guardians,

Minn. 179; Mech. B'k v. Seton, 1 Peters, 399; Russell v. Clark's Ex'rs, 7 Cranch, 69, 97; Wilson v. Mason, 1 Id. 24; Powell v. Monson etc. Man. Co., 3 Mason, 347; Murray v. Ballou, 1 Johns. Ch. 566; Tradesman's B'k v. Merritt, 1 Paige, 302; Mech. B'k v. Levy, 3 Id. 606.

[1] The reason given for this conclusion is, that money is not "earmarked;" when received by the creditor and mingled with his other pecuniary assets, it can not be distinguished and identified. Under these circumstances other kinds of property would remain subject to the trust, since the creditor would not be a *bona fide* purchaser *for value*. Stephens v. Bd. of Education, 79 N. Y. 183; Burnett v. Gustafson, 54 Iowa, 86; Justh v. B'k of Commonwealth, 56 N. Y. 478, 484.

committees of lunatics, agents using money of their principals, partners using partnership funds, husbands purchasing property with money belonging to the separate estate of their wives, parents, and children, and all persons who stand in fiduciary relations towards others. Equity jurisprudence contains few more efficient doctrines than this in maintaining the beneficial rights of property.[1] The evidence that the purchase was made with trust funds, must, however, be clear and unmistakable.

§ 1050. **5. Renewal of Leases by Partners and other Fiduciary Persons.**—Another special form of constructive trusts, depending upon a much more general principle to be examined in subsequent paragraphs, has been established by an unanimity of decision. One member of a partnership can not, during its existence, without the knowledge and consent of his

[1] This form of trusts is treated by some writers as belonging to the denomination of "resulting" trusts, and it has one striking element in common with them—the *intention* with which it is presumed the purchase was made. In every other respect it differs from resulting trusts, and clearly belongs on principle to the class of "constructive" trusts. It is always established *in invitum*, and although an assumption of fraud is not necessary, some element of fraud actual or constructive is in fact generally present. Deg v. Deg, 2 P. Wms. 412, 414; Perry v. Phellips, 4 Ves. 108, 17 Id. 173; Bennett v. Mahew, cited 1 Bro. Ch. 232; 2 Id. 287; Keech v. Sandford, Sel. Cas. Ch. 61; 1 Eq. Lead. Cas. 48, 49, 62; Lench v. Lench, 10 Ves. 511; Trench v. Harrison, 17 Sim. 111; Mathias v. Mathias, 3 Sm. & Giff. 552; Ouseley v. Anstruther, 10 Beav. 453, 461; Flanders v. Thompson, 3 Woods C. C. 9; Watson v. Thompson, 12 R. I. 466; Thomas v. Standiford, 49 Md. 181; Burks v. Burks, 7 Baxt. 353; Miller v. Birdsong, Id. 531; Winkfield v. Brinkman, 21 Kans. 682; Moss v. Moss, 95 Ill. 449; Dodge v. Cole, 97 Id. 338; Derry v. Derry, 74 Ind. 560; Roy v. McPherson, 11 Neb. 197; Reickhoff v. Brecht, 51 Iowa, 633; Barrett v. Bamber, 81 Pa. St. 247; Jones v. Dexter, 130 Mass. 380; Mich. etc. R. R. v. Mellen, 44 Mich. 321; Schlaefer v. Corson, 52 Barb. 510; McLarren v. Brewer, 51 Me. 402; White v. Drew, 42 Mo. 561; Stow v. Kimball, 28 Ill. 93; Barker v. Barker, 14 Wisc. 131; Church v. Sterling, 16 Conn. 388; Johnson v. Dougherty, 18 N. J. Eq. 406; Bancroft v. Consen, 13 Allen, 50; Reid v. Fitch, 11 Barb. 399; Bridenbecker v. Lowell, 32 Id. 9; Robb's Appeal, 41 Pa. St. 45; Smith v. Burnham, 3 Sumn. 435; Oliver v. Piatt, 3 How. (U. S.) 333, 401; Homer v. Homer, 107 Mass. 82; Settembre v. Putnam, 30 Cal. 490; Jenkins v. Frink, 30 Id. 586.

The recent case of Ferris v. Van Vechten, 73 N. Y. 113, reversing S. C., 9 Hun, 12, is a very instructive decision illustrating the extent and limits of this doctrine. An attempt was made to reach land purchased by a trustee, on the ground that it was paid for with trust funds. There was no evidence as to what amount of trust moneys was thus used, and in fact there was no direct positive evidence that *any* such funds were appropriated by the trustee in paying for the land: *Held*, that the doctrine could not be invoked on behalf of the plaintiff. While the general rule was fully admitted, in order that it should be applicable the trust fund must be clearly and distinctly traced, and positively shown to have been used in the purchase. The relief could not be granted upon any mere inference. If the evidence only showed that at one time the trustee had trust funds in his hands, and that afterwards he bought and took the title to a piece of land in his own name, but went no farther, the court could not draw the inference from these bare facts that the trust funds were employed in the purchase, and could not impress a trust upon the land.

copartners, take a renewal lease in his own name or otherwise for his own benefit and to the exclusion of his fellows, of premises leased by the firm or occupied by them as tenants. A lease so taken by a partner inures to the benefit of the whole firm; it is regarded as a continuation of, or as "grafted on" the old lease; a trust will be impressed upon the leasehold estate; equity will treat the partner as a trustee for the firm, and if necessary and possible will compel him to assign the renewal lease to it; if a condition inserted in such lease against assigning should prevent the relief of an actual assignment, it will not in the least prevent the court from enforcing the trust by compelling the partner to hold the legal title for the benefit of all. This rule applies under every variety of circumstances provided the rights of the other partners are still subsisting at the time when the renewal lease is obtained. It operates with equal force whether the renewal lease was to begin during the continuance of the firm or after its termination; whether the partnership was for an undetermined period, or was to end at a specified time, and the renewal lease was not to take effect until the expiration of that prescribed time; whether there was or was not a right in the firm, by contract, custom, or courtesy, to a renewal of the original lease from the lessor; and even whether the landlord would or would not have granted a new lease to the other partners or to the firm. All these facts are wholly immaterial to the application of the doctrine, for its operation does not in the slightest degree depend upon the terms and provisions of the original lease, nor upon the attitude of the landlord. The doctrine is not confined to partners; it extends in all its breadth and with all its effects to trustees, guardians, and all other persons clothed with a fiduciary character, who are in possession of premises as tenants on behalf of their beneficiaries, or who are in possession as tenants of premises in which their beneficiaries are interested.[1] As this rule results from the

[1] In Phyfe v. Wardell, 5 Paige, 268, Walworth, Ch., thus states the doctrine in its general form: "If a person who has a particular or special interest in a lease, obtains a renewal thereof from the circumstance of his being in possession as a tenant, or from having such particular interest, the renewed lease is in equity considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest, either legal or equitable, in the old lease." In Mitchell v. Reed, 61 N. Y. 123, 139, the court, after a full examination of the authorities, summed up the discussion with the following propositions, which they held to be settled conclusions: "(1) A trustee holding a lease, whether corporate or individual, holds the renewal as a trustee, and as he held the original lease; (2) This does not depend upon any right which the *cestui que trust* has to a renewal, but upon the theory that the new lease is, in technical terms, a "graft" upon the

relation of trust and confidence existing between the partners or other persons interested, it might be regarded as an outgrowth of the doctrine formulated in the preceding paragraph. It is more directly, however, a particular application of a broad principle of equity, extending to all actual and *quasi* trustees, that a trustee, or person clothed with a fiduciary character, shall not be permitted to use his position or functions so as to obtain for himself any advantage or profit inconsistent with his supreme duty to his beneficiary.[1]

old one; and that the trustee 'had a facility,' by means of his relation to the estate, for obtaining the renewal, from which he shall not personally profit; (3) This doctrine extends to commercial partnerships, and one of several partners can not, while a partnership continues, take a renewal lease clandestinely, or behind the backs of his associates, for his own benefit. It is not material that the landlord would not have granted the new lease to the other partners, or to the firm; (4) It is of no consequence whether the partnership is for a definite or an indefinite period. The disability to take the lease for individual profit grows out of the partnership relation. While that lasts, the renewal can not be taken for individual purposes, even though the lease does not commence until after the expiration of the partnership; (5) It can not necessarily be assumed that the renewal can be taken by an individual member of the firm, even after dissolution. The former partners may still be tenants in common; or there may be other reasons of a fiduciary nature why the transaction can not be entered into." This conclusion and the statements of the text are fully sustained by the following cases, in which the doctrine has been applied under every variety of circumstances: Keech v. Sandford, Sel. Cas. in Ch. 61; 1 Eq. Lead. Cas. 48, 49, 62 (4th Am. ed.); Holt v. Holt, 1 Chan. Cas. 190; Manlove v. Bale, 2 Vern. 84; Rakestraw v. Brewer, 2 P. Wms. 511; Pickering v. Vowles, 1 Bro. Ch. 197; Lee v. Vernon, 5 Bro. P. C. 10, Hargrave arg.; Alden v. Fouracie, 3 Sw. 489; Cook v. Collingridge, Jacobs, 607, 619; Brown v. De Tastet, Jac. 284; Griffin v. Griffin, 1 Sch. & Lef. 352; Featherstonhaugh v. Fenwick, 17 Ves. 298, 311; Moody v. Matthews, 7 Id. 174, 185 (and note in Sumner's ed.) Clegg v. Fishwick, 1 Macn. & G. 294; Clegg v. Edmondson, 8 De G. M. & G. 787; Clements v. Hall, 2 De G. & J. 173; Burton v. Wookey, 6 Madd. 367; Blissett v. Daniel, 10 Hare, 493, 522, 536; Gardner v. McCutcheon, 4 Beav. 534; Lees v. Laforest, 14 Id. 250; York etc. Ry. Co. v. Hudson, 16 Id. 485; Perens v. Johnson, 3 Sm. & Giff. 419; Burdon v. Barkus, 3 Giff. 412; 4 De G. F. & J. 42; Holridge v. Gillespie, 2 Johns. Ch. 30; Van Horne v. Fonda, 5 Id. 388, 407; Davoue v. Fanning, 2 Id. 252, 258; Phyfe v. Wardell, 5 Paige, 268; Armour v. Alexander, 10 Id. 571; Wood v. Perry, 1 Barb. 114, 134; Gibbes v. Jenkins, 3 Sand. Ch. 130; Dickinson v. Codwise, 1 Id. 214, 226; Doughtery v. Van Nostrand, 1 Hoff. Ch. 68, 70; Bennett v. Van Syckel, 4 Duer, 162; Dunlop v. Richards, 2 E. D. Smith, 181; Struthers v. Pearce, 51 N. Y. 357; Leach v. Leach, 18 Pick. 68, 76; Baker v. Whiting, 3 Sumn. 475, 495; Kelley v. Greenleaf, 3 Story, 93, 101; Huson v. Wallace, 1 Rich. Eq. 1, 2, 4, 7; Lacy v. Hale, 37 Pa. St. 360; Barrett v. Bamber, 81 Id. 247; Winkfield v. Brinkman, 21 Kans. 682; Jones v. Dexter, 130 Mass. 380; Laffan v. Naglee, 9 Cal. 662; Gower v. Andrew, 8 Pac. L. J. 617 (the rule correctly applied by the majority of the court to a confidential managing clerk of a firm).

In the cases where the rule was not applied it will be found that there were always some controlling facts which prevented its operation, even though the rule itself was fully recognized; see Acheson v. Fair, 3 Dr. & War. 512; Nesbitt v. Tredennick, 1 Ball & B. 29, 48; Maunsell v. O'Brien, 1 Jones' Exch. 176, 184; Phillips v. Reeder, 18 N. J. Eq. 95; Musselman's Appeal, 62 Pa. St. 81; Van Dyke v. Jackson, 1 E. D. Smith, 419; Anderson v. Lemon, 8 N. Y. 236; 4 Sandf. 552.

[1] Fox v. Mackreth, 2 Bro. Ch. 400; 2 Cox, 320; 1 Eq. Lead. Cas. 188, 212,

§ 1051. **6. Wrongful Appropriation, or Conversion into a Different Form, of Another's Property.**—In the foregoing fourth form of constructive trust the fiduciary person appropriates trust funds in the purchase of property, but the court imputes no wrongful intent; it *assumes* that he was acting in pursuance of his trust. In the present case the wrongful intent necessarily exists; the intended violation of a fiduciary duty and of another's beneficial rights, is the essential element. A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person having money, or any kind of property belonging to another, in his hands, wrongfully uses it for the purchase of lands, taking the title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name; in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the orignal wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come, except into those of a *bona fide* purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que trust* who has thus been defrauded. As a necessary consequence of this doctrine, whenever property subject to a trust is wrongfully sold and transferred to a *bona fide* purchaser so that it is freed from the trust, the trust immediately attaches to the price or proceeds in the hands of the vendor, whether such price be a debt yet unpaid due from the purchaser, or a different kind of property taken in exchange, or even a sum of money paid to the vendor, as long as the money can be identified and reached in his hands or under his control.[1] It is not essential

237 (4th Am. ed.); Pooley v. Quilter, 2 De G. & J. 327; 4 Drew. 184; Fosbrooke v. Balguy, 1 My. & K. 226; Docker v. Somes, 2 Id. 655. This principle is discussed in the following section.

[1] The doctrine was most clearly and tersely stated by Turner, L. J., in Pennell v. Deffell, 4 De G. M. & G. 372, 388: "It is an undoubted principle of this court, that as between the *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property, belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." Fox v. Mackreth, 1 Eq. Lead. Cas. 188, 212, 237; Taylor v. Plumer, 3 M. & Sel. 562, 574, 576; *Ex parte* Dumas, 1 Atk. 232, 233; Lane v. Dighton, Ambl. 409, 411, 413; Lench v. Lench, 10 Ves. 511, 517; Lewis v. Madocks, 17 Id. 48, 51, 58;

for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrongdoer and the beneficial owner. Wherever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds.

§ 1052. **7. Wrongful Acquisition of the Trust Property by a Trustee or Other Fiduciary Person.**—In several of the preceding subdivisions, the trustee, by means of trust funds, has acquired property from a third person, which thereby becomes subject to the original trust. The present species includes all the various instances in which the trustee or other fiduciary person wrongfully acquires the title and beneficial use of the very trust property itself—the property *in specie* which forms the subject-matter of the trust. The doctrine may be stated in its most general form that whenever a trustee or person clothed with any fiduciary character, takes advantage of the relation, and by means of it acquires the title or use of the trust property, or makes a profit or advantage to himself out of the trust and confidence, then a constructive trust is impressed upon such property, profits, or proceeds in his hands, in favor of the original beneficiary. The following are some of the most important applications of this doctrine. When a trustee, administrator,

Grigg v. Cocks, 4 Sim. 438; Ernest v. Croysdill, 2 De G. F. & J. 175; Barnes v. Addy, L. R., 9 Ch. 244; *Ex parte* Cooke, Id., 4 Ch. D. 123; Nanty-Glo etc. Co. v. Grave, Id., 12 Id. 738; *In re* Hallett's Estate, Id., 13 Id. 696; Rolfe v. Gregory, 4 De G. J. & S. 576; Mansell v. Mansell, 2 P. Wms. 678; Wells v. Robinson, 13 Cal. 133, 140, 141; Lathrop v. Bampton, 31 Id. 17; Schlaeffer v. Corson, 52 Barb. 510; Swinburne v. Swinburne, 28 N. Y. 568 (a most instructive case); Hastings v. Drew, 76 N. Y. 9, 16; Bartlett v. Drew, 57 Id. 587; Holden v. N. Y. & Erie B'k, 72 Id. 286; Newton v. Porter, 69 Id. 133, 136–140; Taylor v. Mosely, 57 Miss. 544; Burks v. Burks, 7 Baxt. 353; Broyles v. Nowlin, 59 Tenn. 191; Tilford v. Torrey, 53 Ala. 120; Pindall v. Trevor, 30 Ark. 249; Friedlander v. Johnson, 2 Woods C. C. 675; McDonough v. O'Niel, 113 Mass. 92; Tracy v. Kelley, 52 Ind. 535; Cookson v. Richardson, 69 Ill. 137; Coles v. Allen, 64 Ala. 98 (when no trust arises); Dodge v. Cole, 97 Ill. 338; Derry v. Derry, 74 Ind. 560; Newton v. Taylor, 32 Ohio St. 399; Barrett v. Bamber, 81 Pa. St. 247; Veile v. Blodgett, 49 Vt. 270; Hubbard v. Burrell, 41 Wisc. 365 (proceeds charged with a trust on sale to a *bona fide* purchaser); Mich. etc. R. R. v. Mellen, 44 Mich. 321; Murray v. Lylburn, 2 Johns. Ch. 441, 443; Boyd v. McLean, 1 Id. 582; Shaw v. Spencer, 100 Mass. 382; Shelton v. Lewis, 27 Ark. 190; Mathews v. Heyward, 2 S. C. 239; Thompson v. Perkins, 3 Mason, 232; Duncan v. Jaudon, 15 Wall. 165.

In order that this species of trust may arise it is not indispensable that the conventional relation of trustee and *cestui que trust*, or even *any* fiduciary relation, should exist between the orignal wrongdoer and the beneficial owner, although such relation generally exists in these cases. Where securities had been stolen, and transferred and sold by the thief, a trust was held impressed upon them and on their proceeds, in the hands of a transferee with notice. Newton v. Porter, 69 N. Y. 133, 140; B'k of America v. Pollock, 4 Edw. Ch. 215.

agent, attorney, or other fiduciary person, without the knowledge or consent of his beneficiary, purchases the trust property at a public or private sale; or when, by taking advantage of the trust and confidence reposed, and of the superiority conferred upon him by the relation, he unconscientiously acquires title to the trust property by purchase or gift directly from the beneficiary; or when he uses the trust property for his own benefit, or in his own business, and by means of such use obtains additional gains and profits; in these and all similar cases, equity impresses a constructive trust upon the property purchased or obtained, and upon the profits and acquisitions so made, for the benefit of the party beneficially entitled.[1] This form of constructive trusts embraces many particular instances, and the principle is extended to all abuses of confidence, whereby the one in whom the confidence is reposed obtains an advantage.

§ 1053. **8. Trusts Ex Maleficio.**—In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a

[1] The dealings between persons in fiduciary relations have been fully examined in the previous section concerning "constructive fraud." The cases there cited are also authorities for and illustrations of the text, since the trust above mentioned arises from the wrongful dealings with trust property there described. See cases cited *ante*, under §§ 957–963; Fox v. Mackreth, 2 Bro. Ch. 400; 2 Cox, 320; 1 Eq. Lead. Cas. 188, 212, 237 (4th Am. ed.); Morret v. Paske, 2 Atk. 52, 54; Powell v. Glover, 3 P. Wms. 252, n.; Docker v. Somes, 2 My. & K. 655; Wedderburn v. Wedderburn, 4 My. & Cr. 41; Great Luxembourg Ry. Co. v. Magnay, 25 Beav. 586; Kimber v. Barber, L. R., 8 Ch. 56; Pooley v. Quilter, 2 De G. & J. 327; 4 Drew. 184; Fosbrooke v. Balguy, 1 My. & K. 226; Willett v. Blanford, 1 Hare, 253; Townend v. Townend, 1 Giff. 201; Fawcett v. Whitehouse, 1 Russ. & M. 132, 149; Bulkley v. Wilford, 2 Cl. & Fin. 102, 177; Ernest v. Croysdill, 2 De G. F. & J. 175; Rolfe v. Gregory, 4 De G. J. & S. 576; Heath v. Crealock, L. R., 18 Eq. 215; Barnes v. Addy, Id., 9 Ch. 244; *Ex parte* Cooke, Id., 4 Ch. D. 123; Nant-y-Glo. etc. Co. v. Grave, Id., 12 Id. 738; *In re* Hallett's Estate, Id., 13 Id. 696; Webster v. King, 33 Cal. 348; Scott v. Umbarger, 41 Id. 410; Guerrero v. Ballerino, 48 Id. 118; Tracy v. Colby, 55 Id. 67; Tracy v. Craig, Id. 91; Davis v. Rock Creek etc. Co., Id. 359; Swinburne v. Swinburne, 28 N. Y. 568; Bennett v. Austin, 81 Id. 308; Hastings v. Drew, 76 Id. 9; Holden v. N. Y. & Erie B'k, 72 Id. 286; Smith v. Frost, 70 Id. 65; Hubbell v. Medbury, 53 Id. 98; Gardner v. Ogden, 22 Id. 327; Manning v. Hayden, 5 Sawy. 360; Broyles v. Nowlin, 59 Tenn. 191; Pindall v. Trevor, 30 Ark. 249; Cookson v. Richardson, 69 Ill. 137; Reickhoff v. Brecht, 51 Iowa, 633; Treadwell v. McKeon, 7 Baxt. 201; Newton v. Taylor, 32 Ohio St. 399; Barrett v. Bamber, 81 Pa. St. 247; Jones v. Dexter, 130 Mass. 380; Rea v. Copelin, 47 Mo. 76; Whitwell v. Warner, 20 Vt. 425; Giddings v. Eastman, 5 Paige, 561; Brown v. Lynch, 1 Id. 147; Blauvelt v. Ackerman, 20 N. J. Eq. 141; Grumley v. Webb, 44 Mo. 444.

constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer.[1] While these instances are so many and various, there are certain special forms of frequent occurrence and great importance, which require particular mention.

§ 1054. **(1) A Devise or Bequest Procured by Fraud.**— Whenever a person procures a devise or bequest to be made directly to himself—and thereby preventing perhaps an intended testamentary gift to another—through false and fraudulent representations, assurances, or promises that he will carry out the original and true purpose of the testator, and will apply the devise or bequest to the benefit of the third person who is the real object, and who would otherwise have been the actual recipient of the testator's bounty, and after the testator's death he refuses to comply with his former assurances or promises, but claims to hold the property in his own right and for his own exclusive benefit; in such case equity will enforce the obligation

[1] See *ante*, cases cited under §§ 946–951, which furnish many examples of these trusts: Dyer v. Dyer, 1 Eq. Lead. Cas. 314, 350–364 (4th Am. ed.), note of American editor; conveyances obtained from persons of weak mind, by undue influence, etc., Addison v. Dawson, 2 Vern. 678; *Ex parte* Roberts, 3 Atk. 308, 310 (lunacy); Att'y-Gen. v. Sothon, 2 Vern. 497; Gould v. Okeden, 4 Bro. P. C. 198; Price v. Berrington, 7 Hare, 394; 3 Macn. & G. 486; Harvey v. Mount, 8 Beav. 439; deeds or wills fraudulently destroyed in order to deprive the owner of his title, Tucker v. Phipps, 3 Atk. 359, 360; Downes v. Jennings, 32 Beav. 290; Bailey v. Stiles, 1 Green Ch. 220; see *ante*, § 919; owners conveying away their property through mistake or ignorance of their rights, Bingham v. Bingham, 1 Ves. Sen. 126; Naylor v. Winch, 1 S. & S. 555, 564; Hollinshead v. Simms, 51 Cal. 158; Mercier v. Hemme, 50 Id. 606; Dewey v. Moyer, 72 N. Y. 70, 76; Hammond v. Pennock, 61 Id. 145; Fulton v. Whitney, 5 Hun, 16; Baier v. Berberich, 6 Mo. App. 537 (a combination to prevent bidding at a public sale of land renders the purchaser a trustee); Beach v. Dyer, 93 Ill. 295 (no trust against the grantee in a fraudulent conveyance of land, unless he was a party to the fraud); Huxley v. Rice, 40 Mich. 73 (trust from actual fraud); Troll v. Carter, 15 W. Va. 567; Phelps v. Jackson, 31 Ark. 272; Hendrix v. Nunn, 46 Tex. 141; Veile v. Blodgett, 49 Vt. 270; Newell v. Newell, 14 Kans. 202; Jenkins v. Doolittle, 69 Ill. 415; Greenwood's Appeal, 92 Pa. St. 181 (extent of such trustee's liability); Barnes v. Taylor, 30 N. J. Eq. 7 (ditto).

by impressing a trust upon the property in favor of the one who has been defrauded of the testator's intended gift, and by treating the actual devisee or legatee as a trustee holding the mere legal title, and by compelling him to carry the trust into effect through a conveyance to the one who is beneficially interested. It is not necessary that the representations, assurances, or promises of the actual devisee or legatee should be in writing; they may be entirely verbal. There are a few cases which seem to hold that a trust will arise under these circumstances from a *mere verbal promise* of the devisee or legatee to hold the property for the benefit of another person. This position, however, is clearly opposed to settled principle. The only ground upon which such a trust can be rested, and is rested by the overwhelming weight of authority, is actual intentional fraud.[1]

§ 1055. **(2) Purchase upon a Fraudulent Verbal Promise.**—A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose—as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like—and having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained, is in fact a scheme of actual deceit. Equity regards

[1] McCormick v. Grogan, L. R., 4 H. L. 82, 97, *per* Lord Westbury (see *ante*, vol. 1, § 431); Podmore v. Gunning, 7 Sim. 644; 5 Id. 485. In this case the V. C. said as the ground of his decision: "I have always understood that the court would interfere to prevent the obtaining of an estate by fraud, notwithstanding the statute of frauds." See also, Sellack v. Harris, 5 Vin. Abr. 521; Chamberlaine v. Chamberlaine, Freem. Ch. 52; Devenish v. Baines, Prec. Chan. 3; Thynn v. Thynn, 1 Vern. 296; Oldham v. Litchfield, 2 Id. 506; Drakeford v. Wilks, 3 Atk. 539; Walker v. Walker, 2 Id. 98; Reech v. Kennigate, Ambl. 67; 1 Ves. Sen. 123; Muckleston v. Brown, 6 Ves. 52; Stickland v. Aldridge, 9 Id. 516; Chamberlain v. Agar, 2 V. & B. 259; Seagrave v. Kirwan, 1 Beat. 157; Dixon v. Olmius, 1 Cox, 414; Bulkley v. Wilford, 8 Bligh, N. S. 111; Chester v. Urwick, 23 Beav. 407; Middleton v. Middleton, 1 J. & W. 94, 96; Church v. Ruland, 64 Pa. St. 432; Hoge v. Hoge, 1 Watts, 163, 213; Dowd v. Tucker, 41 Conn. 197; Williams v. Vreeland, 29 N. J. Eq. 417. In this last case the point was directly decided that a trust arises from such a verbal promise made to the testator. The chancellor said (p. 419): "It is fraud for V. to have induced the testator to make a bequest to him including money intended by the former for the complainants, at his suggestion and on his promise to pay them that money, after the testator's decease, out of the legacy to him, and then after receiving the entire legacy, to refuse to pay them the money which he had so promised to pay." But *per contra* in Bedilian v. Seaton, 3 Wall. Jr. 279, it seems to be held not only that no trust will arise from a mere verbal promise to the testator, however solemn, but none will arise from a fraudulent promise—only a contract which equity will enforce. See also *ante*, cases cited under § 919; 1 Eq. Lead. Cas. 350 (4th Am. ed.)

such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement.[1]

§ 1056. (3.) **No Trust from a mere Verbal Promise.**—The foregoing cases should be carefully distinguished from those in which there is a *mere* verbal promise to purchase and convey land. In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud, by taking from the wrong-doer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts.[2]

[1] The trust in such cases arises wholly from the fraud; the statute of frauds requiring a written declaration of trust does not apply, since trusts *ex maleficio* are excepted from its operation. Hunt v. Roberts, 40 Me. 187; Hodges v. Howard, 5 R. I. 149; Fraser v. Child, 4 E. D. Smith, 153; Hoge v. Hoge, 1 Watts, 163, 214; Cousins v. Wall, 3 Jones Eq. 43; Cameron v. Ward, 8 Ga. 245; Jones v. McDougal, 32 Miss. 179; Martin v. Martin, 16 B. Mon. 8; Arnold v. Cord, 16 Ind. 177; Laing v. McKee, 13 Mich. 124; Nelson v. Worrall, 20 Iowa, 469; Coyle v. Davis, 20 Wisc. 564; Hidden v. Jordan, 21 Cal. 92, 99–102; Sandfoss v. Jones, 35 Id. 481, 489; Coyote etc. Co. v. Ruble, 8 Oreg. 284; Troll v. Carter, 15 W. Va. 567.

The doctrine is often used with great efficacy to prevent the triumph of fraud, and to protect persons under necessities, in cases where an execution sale, or mortgage foreclosure, or other compulsory public sale, a party buys in the land under a prior fraudulent promise made to the owner that the purchaser will take the title, hold the property for the benefit of such owner, and will reconvey to him on being repaid the amount advanced for the purchase price; and having thus by a fraudulent contrivance cut off competition, and prevented the owner from making other arrangements to protect his property, and having obtained the property perhaps for much less than its real value, he refuses to abide by his verbal promise, and retains the land or other property as absolutely his own. Equity will relieve the defrauded owner by impressing on the property a trust *ex maleficio*, and by treating the purchaser as a trustee *in invitum*. This application of the doctrine was explained and the authorities were examined in Ryan v. Dox, 34 N. Y. 307; and Wheeler v. Reynolds, 66 Id. 227. See, also, Dodd v. Wakeman, 26 N. J. Eq. 484; Walker v. Hill's Ex'rs, 22 Id. 519; Merritt v. Brown, 21 Id. 401, 404; Farnham v. Clements, 51 Me. 426; McCulloch v. Cowher, 5 Watts & S. 427, 430; Kisler v. Kisler, 2 Watts, 323; Schmidt v. Gatewood, 2 Rich. Eq. 162; Green v. Ball, 4 Bush, 586; Moore v. Tisdale, 5 B. Mon. 352; Rose v. Bates, 12 Mo. 30; Wolford v. Herrington, 86 Pa. St. 39; 1 Eq. Lead. Cas. 350–364 (4th Am. ed.); as to enforcing such a verbal promise free from fraud, where the statute of frauds is not pleaded as a defense, see Combs v. Little, 3 Green Ch. 310; Marlatt v. Warwick, 18 N. J. Eq. 108; 19 Id. 439; Merritt v. Brown, 21 Id. 401, 404.

[2] Leman v. Whitley, 4 Russ, 423; Levy v. Brush, 45 N. Y. 589; Wheeler v. Reynolds, 66 Id. 227; Payne v. Patterson, 77 Pa. St. 134; Bennett v. Dollar Sav. B'k, 87 Id. 382; Hon v. Hon, 70 Ind. 135; Gibson v. Decius, 82 Ill. 304; Farnham v. Clements, 51

§ 1057. **Trusts in Favor of Creditors.**—In carrying out the general principle of trusts for the purpose of working ultimate justice, and reaching property where the legal title has been parted with, and is beyond the scope of legal process, a constructive trust is said to arise in favor of judgment creditors with respect to the property of their debtors, which has been transferred with the intent to defraud the creditors of their rights, or of which the legal title is vested in third persons with a like fraudulent intent, or which is of such a nature that it can not be taken by execution upon judgments in legal actions.[1]

§ 1058. **Rights and Remedies of the Beneficiary.**—The essential nature of constructive trusts has been explained in a former pargraph.[2] Equity regards the *cestui que trust*, in all instances except that last mentioned in favor of creditors, although without any legal title, and perhaps without any written evidence of interest, as the real owner, and entitled to all the rights and consequences of such ownership. Numerous important questions concerning the conduct of trustees, their relations with the trust property, and with the beneficiaries, which arise from express trusts, can have no existence in connection with constructive trusts. Every act of the trustee in holding, managing, investing, or otherwise dealing with the trust property as though he could retain it, is itself a violation of his paramount obligation to the beneficiary. If the trustee refuses or delays to convey the property to its beneficial owner, and retains it, derives benefit from its use, and appropriates its rents, profits, and income, he must account for all that he thus receives, and pay over the amount found to be due to the *cestui que trust*, as well as convey to him the corpus of the trust fund. The beneficiary, therefore, being the true owner, may always,

Me. 426; Pattison v. Horn, 1 Grant's Cas. (Pa.) 301; Hogg v. Wilkins, 1 Id. 67; Barnet v. Dougherty, 32 Pa. St. 371; Campbell v. Campbell, 2 Jones' Eq. 364; Chambliss v. Smith, 30 Ala. 366; Whiting v. Gould, 2 Wisc. 552; 1 Eq. Lead. Cas. 355–364 (4th Am. ed.)

[1] The trust is in reality one in name alone; the creditor's right to reach the debtor's property is in no true sense an *interest* in that property; it is at most only an equitable lien on the property. Since the creditor's right to pursue his debtor's property under the circumstances mentioned, is constantly spoken of by judges and text-writers as based upon a trust affecting such property, I have simply enumerated the case among the different species of constructive trusts. The examination of the doctrine is postponed until the subject of "creditors' suits" and other similar remedies is reached. See Dewey v. Moyer, 72 N. Y. 70, 76; Bliss v. Matteson, 45 Id. 22, 24; Savage v. Murphy, 34 Id. 508; 8 Bosw. 75; King v. Wilcox, 11 Paige, 589; Loomis v. Tifft, 16 Barb. 541, 543; Mead v. Gregg, 12 Id. 653; Day v. Cooley, 118 Mass. 524; Partridge v. Messer, 14 Grey, 180; Case v. Gerrish, 15 Pick. 40, 50; Mann v. Darlington, 15 Pa. St. 310; Jones v. Reeder, 22 Ind. 111; Kahn v. Gumberts, 9 Id. 430; and see *ante*, §§ 972, 973.

[2] See *ante*, § 1044.

by means of an equitable suit, compel the trustee to convey or assign the corpus of the trust property, and to account for and pay over the rents, profits, issues, and income which he has actually received, or in general which he might with the exercise of reasonable care and diligence have received.[1] In such a suit the plaintiff is also entitled to any additional or auxiliary remedy, such as injunction, cancellation, accounting, which may be necessary to render his final relief fully efficient. No change in the form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated. If the trust property has been transferred to a *bona fide* purchaser for value without notice, or has lost its identity, the beneficial owner must, and under other circumstances he may, resort to the personal liability of the wrong-doing trustee.[2] The existence of a constructive trust, as of a resulting one, must be proved by clear, unequivocal evidence.[3]

SECTION VI.

POWERS, DUTIES, AND LIABILITIES OF EXPRESS TRUSTEES.

ANALYSIS.

§ 1059. Divisions.
§ 1060. *First.* Powers and modes of acting.
§§ 1061–1083. *Second.* Duties and liabilities.
§§ 1062–1065. I. To carry the trust into execution.
§ 1062. 1. The duty to conform strictly to the directions of the trust.
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§§ 1066–1074. II. To use care and diligence.
§ 1067. 1. The duty of protecting the trust property.
§ 1068. 2. The duty not to delegate his authority.
§ 1069. 3. The duty not to surrender entire control to a co-trustee.

[1] There are instances, where the trustee has acted in good faith, in which a court of equity would only hold him accountable for what he had *actually* received, and would not charge him with proceeds or profits which he might have received, nor with compound interest, etc. See Barnes v. Taylor, 30 N. J. Eq. 7; Greenwood's Appeal, 92 Pa. St. 181.

[2] Lathrop v. Bampton, 31 Cal. 17.

[3] As to delay in enforcing the beneficiary's right, see Rolfe v. Gregory, 4 De G. J. & S. 576; Manning v. Hayden, 5 Sawy. C. C. 360; North Car. R. R. v. Drew, 3 Woods, C. C. 691 (acquiescence); German Am. Sem. v. Kiefer, 43 Mich. 105.

§ 1070. 4. The amount of care and diligence required.
§ 1071. 5. The duty as to investments.
§ 1072. The necessity of making investments.
§ 1073. Kinds of investments: When particular securities are expressly authorized.
§ 1074. The same: When no directions are given
§§ 1075–1078. III. To act with good faith.
§ 1075. 1. The duty not to deal with the trust property for his own advantage.
§ 1076. 2. The duty not to mingle trust funds with his own.
§ 1077. 3. The duty not to accept any position, or enter into any relation, or do any act inconsistent with the interests of the beneficiary.
§ 1078. 4. The duty not to sell trust property to himself, nor to buy from himself.
§§ 1079–1083. IV. Breach of trust and liability therefor.
§ 1080. Nature and extent of the liability.
§ 1081. Liability among co-trustees.
§ 1082. Liability for co-trustees.
§ 1083. The beneficiary acquiescing, or a party to the breach of trust.
§ 1084. *Third.* The trustee's compensation and allowances.
§ 1085. Allowances for expenses and outlays; lien therefor.
§ 1086. *Fourth.* Removal and appointment of trustees.
§ 1087. Appointment of new trustees.

§ 1059. **Divisions.**—The duties and liabilities of the trustees and corresponding rights of the beneficiaries in trusts arising by operation of law, have been explained in the preceding section. The discussions of the present section refer primarily and mainly to the powers, duties, and liabilities of the trustees in express trusts of all kinds and for all purposes, and the statement of their duties and liabilities necessarily includes the correlative rights and remedies of the *cestuis que trustent;* some of the conclusions may, however, apply to the trustees in resulting and constructive trusts. The entire subject embraces the following subdivision: (1) The trustee's powers and modes of acting; (2) his duties and liabilities; (3) his compensation and allowances; (4) removal and appointment of trustees.

§ 1060. **First. Powers and Modes of Acting.**—Although an acceptance by the trustee is not required in order to assure the interest and rights of the beneficiary, it is essential to the existence of any power or liability of the trustee himself. both his powers and his liabilities originate upon his acceptance.[1] The acceptance may be express by executing an instrument in writing, or implied from acts done by the trustee in carrying

[1] See *ante*, § 1007; Ainsworth v. 4 Johns. 84; Smedes v. B'k of Utica, Backus, 5 Hun, 414; Thorne v. Deas, 20 Id. 372.

the trust into effect, or in dealing with the trust property.[1] When property is given upon trust to two or more trustees, they become joint owners, and in general all who have accepted must unite in conveyances and similar solemn and important acts.[2] It results from the joint tenancy of trustees that when one dies or resigns, all the estate and powers remain in the survivors or survivor; and this right of survivorship will not be affected merely because there is a power of appointing new trustees in the place of those dying or ceasing to act; it will operate until the new trustees are appointed.[3] Upon the death of a single trustee or a last survivor, the trust may devolve upon his heir or administrator until a new trustee is appointed.[4]

§ 1061. **Second. Duties and Liabilities.**—In this subdivision I shall state the general duties of express trustees, the violations of them which constitute a breach of trust, and the nature and extent of the liabilities incurred thereby. The doctrines to be examined are those which courts of equity apply in controlling the conduct of all classes of persons who are clothed with fiduciary relations towards property in which others are beneficially interested—including trustees proper, executors and administrators, guardians of infants or of persons *non compotes mentis*, directors or managers of corporations, and other *quasi* trustees.[5] All the various duties of actual and *quasi* trustees may be grouped under three general heads: (1) to carry out the trust; (2) to use care and diligence; (3) to act with good faith; and each of these contain several more specific obligations.

[1] Urch v. Walker, 3 My. & Cr. 702; Crewe v. Dicken, 4 Ves. 97; Armstrong v. Morrill, 14 Wall. 120, 139; see Life Ass'n of Scotland v. Siddal, 3 De G. F. & J. 58; Youde v. Cloud, L. R., 18 Eq. 634.

[2] This assumes, of course, that there is no express provision to the contrary in the instrument creating the trust. Learned v. Welton, 40 Cal. 349 Saunders v. Schmælzle, 49 Id. 59, 67; Boston v. Robbins, 126 Mass. 384; *In re* Bernstein, 3 Redf. 20; Crane v. Hearn, 26 N. J. Eq. 378; Lee v. Sankey, L. R., 15 Eq. 204; Charlton v. Earl of Durham, Id., 4 Ch. 433 (but a receipt by one of two executors who are also trustees, is operative and sufficient).

[3] Lane v. Debenham, 11 Hare, 188; Warburton v. Sandys, 14 Sim. 622; *In re* Waddell's Contract, L. R., 2 Ch. D. 172; *In re* Cookes' Contract, Id., 4 Id. 454; Saunders v. Schmælzle, 49 Cal. 59, 67; *In re* Bernstein, 3 Redf. 20.

[4] Robson v. Flight, 4 De G. J. & S. 608 (the heir at law in such case can not exercise *discretionary* powers given to the trustee, although he holds the estate subject to the trust); Sander v. Heathfield, L. R., 19 Eq. 21; Rackham v. Siddall, 1 Macn. & G. 607; Lord v. Wightwick, 4 De G. M. & G. 803; Russell v. Peyton, 4 Ill. App. 473; and see Clark v. Tainter, 7 Cush. 567; Treadwell v. Cordis, 5 Gray, 341, 359; Warden v. Richards, 11 Id. 277; Dunning v. Ocean Nat. B'k, 6 Lans. 296; Evans v. Chew, 71 Pa. St. 47; Waters v. Margerum, 60 Id. 39; Gray v. Henderson, 71 Id. 368.

[5] These doctrines are embodied in the proposed Civil Code of New York, §§ 1177–1188; 1196–1201; 1202–1207; and in the Civil Code of California, §§ 2228–2239; 2258–2263; 2267–2269; 2273–2275.

§ 1062. **I. To Carry the Trusts into Execution. 1. The Duty to Conform Strictly to the Directions of the Trust.**—Under the general obligation of carrying the trust into execution, trustees and all fiduciary persons are bound, in the first place, to conform strictly to the directions of the trust. This is in fact the corner-stone upon which all other duties rest, the source from which all other duties take their origin. The trust itself, whatever it be, constitutes the charter of the trustee's powers and duties; from it he derives the rule of his conduct; it prescribes the extent and limits of his authority; it furnishes the measure of his obligations. If the trust is express, created by deed or will, then the provisions of the instrument must be followed and obeyed. If the fiduciary relation is established by law and regulated by settled legal rules, then these legal rules must constantly guide and restrain the conduct of the one who occupies the relation. In this manner the acts, powers, duties, and liabilities of executors, administrators, guardians, and corporation directors are governed by a fixed system of legal rules which constitute their instrument or declaration of trust.[1] A trustee can use the property only for the purposes contemplated in the trust, and must conform to the provisions of the trust in their true spirit, intent, and meaning, and not merely in their letter. If therefore, through non-feasance, he omits to carry the trust into execution, or through misfeasance he disobeys the directions of the trust, he renders himself in some manner liable to the beneficiary whose rights have been thus violated.[2] Trustees in car-

[1] In the case of corporation directors and officers the charters and by-laws are the primary source of the fiduciary power and duty. Even if the trust is a pure resulting or constructive one, the simple duty to convey the property, and pay over all its profits, to the beneficiary, is marked out by the law.

[2] As an illustration merely, in a trust to sell, the trustee must not sell except for a proper object, and must protect the interests of all the *cestuis que trustent* in selling, by obtaining as far as may be reasonable, the full value, or the best possible price, etc. Mortlock v. Buller, 10 Ves. 292, 308; Wilkins v. Fry, 1 Meriv. 244, 268; Ord v. Noel, 5 Madd. 438; Adair v. Brimmer, 74 N. Y. 539; Penny v. Cook, 19 Iowa, 538. The following cases are given only as illustrations of the doctrine, since its application must necessarily depend upon the circumstances of each case. Stroughill v. Anstey, 1 De G. M. &. G. 635; Boulton v. Beard, 3 Id. 608; Lord v. Wightwick, 4 Id. 803; *In re* Woodburn's Will, 1 De G. & J. 333; Brunskill v. Caird, L. R., 16 Eq. 493; Carlyon v. Truscott, Id., 20 Eq. 348; Thompson v. Hudson, Id., 2 Ch. 255; Talbot v. Marshfield, Id., 3 Ch. 622; Dance v. Goldingham, Id., 8 Ch. 902; Tolson v. Sheard, Id., 5 Ch. D. 19; Avery v. Griffin, Id., 6 Eq. 606; Vyse v. Foster, Id., 8 Ch. 309; O'Halloran v. Fitzgerald, 71 Ill. 53; Roberts v. Moseley, 64 Mo. 507; Vose v. Trustees, etc., 2 Woods, 647; Hill v. Den, 54 Cal. 6; Iles v. Martin, 69 Ind. 114; Bowman v. Pinkham, 71 Me. 295; *In re* Lewis, 81 N. Y. 421; James v. Cowing, 82 Id. 449; Sharp v. Goodwin, 51 Cal. 219 (if trustees for creditors sell and transfer the property to a third person who has notice of the trust, but pays value, and he converts the property into money and pays off all the creditors, then they have no cause of action against the original trustees).

rying the trust into execution, are not confined to the very letter of the provisions. They have authority to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual. This implied discretion in the choice of measures and acts is subject to the control of a court of equity, and must be exercised in a reasonable manner.[1] It follows from their general duty, that trustees can not set up the adverse title of a stranger against their *cestuis que trustent*, and much less buy up and hold such adverse title for their own benefit.[2]

§ 1063. **2. The Duty to Account.**—As a branch of the general obligation of carrying the trust into execution, a trustee is also bound to account for all the trust property. He must not only render a full account of his conduct at the time of final settlement, but it is one of his most imperative duties to keep regular and accurate accounts during the whole course of the trust of all property coming into, passing out of, or remaining in his hands. These accounts must clearly distinguish between

[1] The following are examples, and individual cases can only be cited as examples upon such a proposition: Kekewich v. Marker, 3 Macn. & G. 310; Barnett v. Sheffield, 1 De G. M. & G. 371; Manser v. Dix, 8 Id. 703; Tait v. Lathbury, L. R., 1 Eq. 174; *In re* Peyton's Trust, Id., 7 Eq. 463; *In re* Chawner's Will, Id., 8 Eq. 569; Messeena v. Carr, Id., 9 Eq. 260; *In re* Lord Hotham's Trusts, Id., 12 Eq. 76; *In re* Shaw's Trusts, Id., 12 Eq. 124; Armstrong v. Armstrong, Id., 18 Eq. 541; Hayward v. Pile, Id., 5 Ch. 214; Astley v. Earl of Essex, Id., 6 Ch. 898; Austin v. Austin, Id., 4 Ch. D. 233; Leeming v. Lady Murray, Id. 13 Ch. D. 123; Hayes v. Oatley, Id., 14 Eq. 1; Goddard v. Brown, 12 R. I. 31; Aldrich v. Aldrich, 12 Id. 141; Luigi v. Luchesi, 12 Nev. 306; Phelps v. Harris, 51 Miss. 789; Rammelsberg v. Mitchell, 29 Ohio St. 22; Vallette v. Bennett, 69 Ill. 632; Zabriskie's Ex'rs v. Wetmore, 26 N. J. Eq. 18; Macon etc. R. R. v. Georgia etc. R. R., 63 Ga. 103; Starr v. Moulton, 97 Ill. 525.

Whenever the instrument of trust expressly confers upon trustees a discretion as to acts and measures in carrying out the general object of the trust, a court of equity will not generally interfere to control such discretion, except to prevent its abuse or unreasonable exercise to the actual or probable prejudice of the beneficiaries. *In re* Beloved Wilkes's Charity, 3 Macn. & G. 440; Brophy v. Bellamy, L. R., 8 Ch. 798; *In re* Hodges, Id., 7 Ch. D. 754; Tabor v. Brooks, Id., 10 Ch. D. 273; Thomas v. Dering, 1 Keen, 729; Sillibourne v. Newport, 1 K. & J. 602; *In re* Coe's Trust, 4 Id. 199; Walker v. Walker, 5 Madd. 424; Bankes v. Le Despencer, 11 Sim. 508, 527; Cowley v. Hartstonage, 1 Dow, 361, 378; Potter v. Chapman, Ambl. 98; Wain v. Earl of Egmont, 3 My. & K. 445; Costabadie v. Costabadie, 6 Hare, 410, 414; Att'y-Gen. v. Mosely, 2 De G. & Sm. 398; Prendergast v. Prendergast, 3 H. L. Cas. 195; Goddard v. Brown, 12 R. I. 31; Aldrich v. Aldrich, 12 Id. 141; Haydel v. Hurck, 5 Mo. App. 267; Starr v. Moulton, 97 Ill. 525; Morton v. Southgate, 28 Me. 41; Littlefield v. Cole, 33 Id. 552; Hawes Place Cong. Soc. v. Trustees etc., 5 Cush. 454; Leavitt v. Beirne, 21 Conn. 1; Arnold v. Gilbert, 3 Sandf. Ch. 531; Mason v. Mason's Ex'rs, 4 Id. 623; Pulpress v. African Ch., 48 Pa. St. 204; Cochran v. Paris, 11 Gratt. 348, 356.

[2] Newsome v. Flowers, 30 Beav. 461; O'Halloran v. Fitzgerald, 71 Ill. 53; Roberts v. Moseley, 64 Mo. 507; Morrow v. Saline Co. Comm'rs, 21 Kans. 484; and see Neale v. Davis, 5 De G. M. & G. 258, 263.

the trust property and his own individual assets—for the two should never be mingled in the accounts nor in use; they should show all receipts and payments; and should at all times be open to the inspection, and produced at the demand of the beneficiary.[1]

§ 1064. **3. The Duty to Obey Directions of the Court.**—Wherever there is any *bona fide* doubt as to the true meaning and intent of provisions of the instrument creating the trust, or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit in equity, at the expense of the trust estate, and obtain a judicial construction of the instrument, and directions as to his own conduct. Such directions he must, of course, faithfully obey, and if he does so he will be relieved from all responsibility therefor. Wherever any suit or proceeding is instituted by the beneficiary or other person interested, and the court by its decree or order therein directs anything to be done or omitted by the trustee, such directions are imperative and must be implicitly obeyed. A refusal or neglect to obey may render the trustee liable to summary punishment as for a contempt by fine and imprisonment.[2]

§ 1065. **4. The Duty to Restore the Trust Property at the End of the Trust.**—Finally, when the trust is ended and the authority of the trustee as such ceases, it is his duty to restore the property to the persons who are then entitled to it either by the terms of the instrument or by operation of legal rules. To accomplish this object he is bound to make such conveyances as the parties may require in order to vest the title in them.[3]

[1] A failure to keep full or accurate accounts raises all presumptions against the trustee; it may subject him to pecuniary loss by rendering him liable to pay interest, or chargeable with moneys received and not duly accounted for. See Pearse v. Green, 1 J. & W. 135; Freeman v. Fairlee, 3 Meriv. 40, 42; White v. Lady Lincoln, 8 Ves. 363; Lord Chedworth v. Edwards, Id. 46; Lupton v. White, 15 Id. 432, 440; Ottley v. Gilby, 8 Beav. 602; Horton v. Brocklehurst, 29 Id. 504; McDonnell v. White, 11 H. L. Cas. 570; Cramer v. Bird, L. R., 6 Eq. 143; Talbot v. Marshfield, Id., 3 Ch. 622; Clark v. Moody, 17 Mass. 145, 148; Cooley v. Betts, 24 Wend. 203; Lockwood v. Thorne, 11 N. Y. 170; Hart v. Ten Eyck, 2 Johns. Ch. 62, 108; Miller v. Simonton, 5 S. C., 20.

[2] Several of these cases are examples of such applications, or of when applications are or are not necessary. *In re* Shaw's Trusts, L. R., 12 Eq. 124; *In re* Strutt's Trusts, Id., 16 Id. 629; *In re* Potts' Estate, Id., Id. 631, n.; *In re* T——, Id., 15 Ch. D. 78; Middleton v. Chichester, Id., 6 Ch. 152; Evans v. Bear, Id., 10 Id. 76; Iles v. Martin, 69 Ind. 114; James v. Cowing, 82 N. Y. 449; Williams v. Dwinelle, 51 Cal. 442, 446. Among the instances where a suit for a judicial construction is proper, is that of a will creating trusts or giving property in trust; see *ante*, vol. 1, § 352, n. (1). This particular subject is more fully examined in a subsequent section.

[3] The trustee *may* under some circumstances demand a release of the trust from those to whom he transfers the estate. King v. Mullins, 1 Drew. 308; Goodson v. Ellison, 3 Russ, 583; Hampshire v. Bradley, 2 Coll. 34;

§ 1066. **II. To Use Care and Diligence.**—The second branch of the trustee's obligation is to use care and diligence in the discharge of his functions. This duty is very comprehensive; it extends through the entire range of his conduct; it is entirely independent of the question of good faith, for he will be liable for its failure even when no wrongful intent nor violation of good faith is charged upon him. He may be liable for its neglect by being held answerable for property actually lost through want of care or prudence, and also for moneys which he might have received if he had exercised due care, prudence, and judgment in his investments and other dealings with the trust estate. This head embraces the protection of trust property; the delegation of authority to third persons and to co-trustees; the amount of care and diligence requisite; and the important subject of making investments, which will be considered in the order here indicated.

§ 1067. **1. The Duty of Protecting the Trust Property.** The trustee is bound to protect the trust property in every reasonable manner during the continuance of the trust.[1] He must, therefore, with due diligence, obtain possession of the trust property, and must then retain it securely under his own control. He can not divest himself of the trust by conveying or assigning the property away to third persons, unless the trust itself is for the very purpose of a sale or other disposition; and even then he can only dispose of the property in pursuance of the trust, and to carry out its objects.[2] As a

Whitmarsh v. Robertson, 1 Y. & C. 715; Holford v. Phipps, 3 Beav. 434; Yeates v. Roberts, 7 De G. M. & G. 227; 3 Drew. 170; Cramer v. Bird, L. R., 6 Eq. 143; Stokes's Appeals, 80 Pa. St. 337; Pennock v. Lyons, 118 Mass. 92 (a lease executed by trustees in ignorance of the fact that the *cestui que trust* had died, and the trust thereby ended, is voidable only).

[1] The following cases are cited simply as illustrations of this duty, and as examples of acts which have been held to be or not to be violations of it: Wiles v. Gresham, 5 De G. M. & G. 770; Lloyd v. Attwood, 3 De G. & J. 614; Harper v. Hayes, 2 De G. F. & J. 542; Case v. James, 3 Id. 256; Turquand v. Marshall, L. R., 6 Eq. 112; Taylor v. Cartwright, Id., 14 Id. 167; *Ex parte* Dressler, Id., 9 Ch. D. 252; Butler v. Carter, Id., 5 Eq. 276; Talbot v. Marshfield, Id., 3 Ch. 622; Dance v. Goldingham, Id., 8 Id. 902; Tolson v. Sheard, Id., 5 Ch. D. 19; *In re* T——, Id., 15 Id. 78; *Ex parte* Culley, Id., 9 Id. 307; Goddard v. Brown, 12 R. I. 31; Pool v. Dial, 10 S. C. 440; Vose v. Trustees, etc., 2 Woods, 647; Carpenter v. Carpenter, 12 R. I. 544; Gilmore v. Tuttle, 32 N. J. Eq. 611; Russell v. Peyton, 4 Ill. App. 473; Morrow v. Saline Co. Comm'rs, 21 Kans. 484; Adair v. Brimmer, 74 N. Y. 539; Foscue v. Lyon, 55 Ala. 440; Wasson v. Garrett, 58 Tenn. 477; Mansfield v. Alwood, 84 Ill. 497; Sharp v. Goodwin, 51 Cal. 219; Gettins v. Scudder, 71 Ill. 86.

[2] The trustee is, of course, liable for any loss occasioned by his undue neglect to obtain possession of the property or to retain it securely. See Salway v. Salway, 2 Russ. & M. 215; Butler v. Carter, L. R., 5 Eq. 276; Youde v. Cloud, Id., 18 Eq. 634; *Ex parte* Ogle, Id., 8 Ch. 711.

mode of obtaining secure possession, the trustee must, with all reasonable diligence, collect debts and demands, and the amounts due on choses in action, when required to do so by the terms of the trust instrument, or by the nature and objects of the trust, and he is liable for losses resulting from his neglect or unreasonable delay in this matter.[1] Trust moneys may be deposited for a reasonable time in a bank having good credit, if the deposit is made to the credit of the trust estate, and not in the trustee's individual name and account; and the trustee does not become liable for a loss occasioned by a failure of the bank under these circumstances.[2] He is liable, however, for a loss resulting from a failure of the bank or of a broker, when funds which ought to have been invested are left remaining on deposit, or when the deposit is in the trustee's individual account mingled with his own funds.[3] For wrongful payments made to third persons, or to a *cestui que trust*, the trustee is generally chargeable.[4]

§ 1068. **2. The Duty not to Delegate his Authority.**— The office of a trustee is one of personal confidence and can not be delegated. A trustee, therefore, unless expressly author-

[1] The trustee's duties and liabilities concerning investments, and his permitting funds to remain invested in certain kinds of securities, are stated in subsequent paragraphs (§§ 1071–1074). The nature of the trust will generally determine whether notes, stocks, and other things in action, should be converted into money. If the trust instrument in terms gives to a beneficiary the income arising from certain specified choses in action, the form of the investment would thus be declared, and no duty would generally arise to convert such securities into money. See Wiles v. Gresham, 2 Drew. 258; 5 De G. M. & G. 770; Grove v. Price, 26 Beav. 103; Sculthorpe v. Tipper, L. R., 13 Eq. 232; *Ex parte* Ogle, Id., 8 Ch., 711; Bacot v. Heyward, 5 S. C. 441 (compromising a debt); Mansfield v. Alwood, 84 Ill. 497 (collecting rents and profits); Dockery v. French, 73 N. C. 420 (receiving payments in confederate money); Moore v. Mitchell, 2 Woods, 483 (ditto).

[2] Rowth v. Howell, 3 Ves. 565; Swinfen v. Swinfen, 29 Beav. 211; Pennell v. Deffell, 4 De G. M. & G. 372; Carpenter v. Carpenter, 12 R. I. 544 (bonds placed in a bank as a special deposit and stolen); Crane v. Moses, 13 S. C. 561.

[3] Challen v. Shippam, 4 Hare, 555; Johnson v. Newton, 11 Id. 160; Swinfen v. Swinfen, 29 Beav. 211; Rehden v. Wesley, Id. 213; Matthews v. Brise, 6 Id. 239; Moyle v. Moyle, 2 Russ. & M. 710; Salway v. Salway, 2 Id. 215. As to mingling trust funds with his own, see *post*, § 1076.

[4] Each case must, to a great extent, stand upon its own circumstances. Where a payment made in good faith and with the exercise of reasonable care and prudence, turns out to be wrong, the trustee may not be obliged to make the amount good for the benefit of the estate. The following cases are mere examples: Forshaw v. Higginson, 8 De G. M. & G. 827; Aveline v. Melhuish, 2 De G. J. & S. 288; Darke v. Williamson, 25 Beav. 622; Ward v. Ward, 2 H. L. Cas. 777, 784; Gunnell v. Whitear, L. R., 10 Eq. 664; Hayes v. Oatley, Id., 14 Eq. 1; Taylor v. Cartwright, Id., 14 Eq. 167; *Ex parte* Ogle, Id., 8 Ch. 711; *In re* Englefield etc. Co., Id., 8 Ch. D. 388; *In re* Cull's Trusts, Id., 20 Eq. 561; Talbot v. Marshfield, Id., 3 Ch. 622; Haydel v. Hurck, 5 Mo. App. 267; Singleton v. Lowndes, 9 S. C. 465; Wasson v. Garrett, 58 Tenn. 477; Draper v. Stone, 71 Me. 175.

ized by the instrument of trust, can not delegate, or transfer, or intrust, in whole or in part, his powers of discretion and management to any associate, subordinate, or assistant who takes his place and assumes his responsibility. If he does so, he remains liable to the beneficiary and is chargeable for all acts and omissions of his delegate, and with all losses whether occasioned by the latter's fraud, neglect, want of good faith, or other cause.[1] This rule does not prohibit a trustee from employing agents. He may act through agents in his administrative operations whenever such a mode of dealing is in accordance with the ordinary course of business.[2]

§ 1069. **3. The Duty not to Surrender Entire Control to a Co-trustee.**—As a trustee can not delegate his authority to a subordinate, so on the same principle he can not idly yield or surrender the entire control of the trust property and exercise of the trust functions to his co-trustees, when he is associated in the trust with others. A trustee is not liable under all circumstances for every act or default of his co-trustees; but still in general, where there are several trustees, the beneficiary is entitled to that security and protection which result from the care, oversight, and co-operation of all the trustees. If, therefore, a trustee virtually abandons his active functions, neglects to interpose in the management, and leaves the whole control to his co-trustees, he will be liable for losses occasioned by their wrongful acts or neglects.[3]

[1] *Ex parte* Rigley, 19 Ves. 463; Adams v. Clifton, 1 Russ. 297; Salway v. Salway, 4 Russ. 60; 2 Russ. & M. 215; Eaves v. Hickson, 30 Beav. 136; Turner v. Corney, 5 Id. 515, 517; Ghost v. Waller, 9 Id. 497; Griffiths v. Porter, 25 Id. 236; Rowland v. Witherden, 3 Macn. & G. 568; Bostock v. Floyer, L. R., 1 Eq. 26; Berger v. Duff, 4 Johns. Ch. 368; Hawley v. James, 5 Paige, 318; Pearson v. Jamison, 1 McLean, 197; Vose v. Trustees etc., 2 Woods, 647; Seely v. Hills, 49 Wisc. 473.

[2] For example: He may employ a steward or manager of the estate for all matters strictly ministerial; he can, of course, employ clerks, bookkeepers, and the like; he can deposit trust moneys in a responsible bank, and direct clerks who collect sums to deposit them therein; he can remit moneys by bills drawn on and by responsible parties, etc. If he act in such manner according to the customary modes of doing business, in good faith and with reasonable prudence, he will not be responsible for the loss of trust funds occurring through such dealings. Wren v. Kirton, 11 Ves. 377; Massey v. Banner, 1 J. & W. 241; Clough v. Bond, 3 My. & Cr. 490; Joy v. Campbell, 1 Sch. & Lef. 328, 341; Darke v. Martyn, 1 Beav. 525; Hawley v. James, 5 Paige, 318, 487; Sinclair v. Jackson, 8 Cow. 543; Abbot v. Rubber Co., 33 Barb. 578; Leggett v. Hunter, 19 N. Y. 445; Blight v. Schenck, 10 Barr, 285; Lewis v. Reed, 11 Ind. 239; Telford v. Barney, 1 Iowa, 575, 591.

[3] Clough v. Bond, 3 My. & Cr. 490, 497; Burrows v. Walls, 5 De G. M. & G. 233; Styles v. Guy, 1 Macn. & G. 422; Paddon v. Richardson, 7 De G. M. & G. 563; Thompson v. Finch, 8 Id. 560, 563, 564; Bates v. Underhill, 3 Redf. 365; Gray v. Reamer, 11 Bush, 113; Spencer v. Spencer, 11 Paige, 299; Clark v. Clark, 8 Id. 152; Monell v. Monell, 5 Johns. Ch. 283; Banks v. Wilkes, 3 Sandf. Ch. 99; Pim v. Downing, 11 Serg. & R. 66; Jones's Appeal,

§ 1070. **4. The Amount of Care and Diligence Required.** The principle is well settled that trustees are bound to exercise care and prudence in the execution of their trust, in the same degree that men of common prudence ordinarily exercise in their own affairs. A trustee, in other words, must use the same care, skill, diligence, and prudence in his management of the trust and his dealings with the trust property, which a man of ordinary care, skill, and prudence would use in his own transactions and with his own property under like circumstances; and the trustee is answerable for all losses, deficiencies, and injuries which are occasioned by his affirmative or negative violation of this obligation.[1] The law does not cast upon the trus-

8 Watts & S. 143, 147; Wayman v. Jones, 4 Md. Ch. 500; Ringgold v. Ringgold, 1 Har. & G. 11; Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. 157; Royall's Adm'r v. McKenzie, 25 Ala. 363; State v. Guilford, 15 Ohio, 593; for the relations between co-trustees and their liabilities in general, see *post*, §§ 1081, 1082.

[1] This doctrine was so fully and ably examined in the very recent case of Hun v. Cary, 82 N. Y. 65, that I shall quote from it at some length. The action was brought by a receiver representing the depositors against a portion of the directors of a savings bank. The bank was located in New York city, and did a very small business. Up to January, 1873, its average deposits were about $70,000, and its income had been less than its expenses. In May, 1873, the bank, by order of the board of directors, bought a lot for $29,000, paying $10,000 of this price in cash; it then erected a building on this lot costing $27,000, and gave a mortgage thereon for $30,500. All this was done with the avowed object of increasing the apparent credit of the bank and thereby its business. Two years after the bank failed. This lot and building, and other property amounting only to $1,000, constituted the entire assets of the bank. In other words, all the assets except $1,000 were swallowed up in the lot and building, and this was all swept away by a foreclosure of the mortgage. Before the purchase of the lot, the bank had occupied leased rooms; and its total assets were several thousand dollars less than its debts, which fact was known to the directors when they made the purchase. The charter gave the directors power to purchase a lot for a banking-house. *Held*, that the transaction was not a mere error of judgment, and that the directors were personally liable. In regard to the position of directors, the court held that the relation of the directors to the *bank* was that of agent to a principal; the relation of the directors to the *depositors* was that of trustee and *cestui que trust*. On the general doctrine concerning the duty of trustees, the court said, *per* Earl, J. (p. 70): "If the trustees act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith, within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. * * When one deposits money in a savings bank, or takes stock in a corporation, he expects, and has the right to expect, that the trustees or directors will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. (First Nat. B'k v. Ocean Nat. B'k, 60 N. Y. 278.) There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and

tee an extraordinary duty, nor demand an extraordinary care, nor hold him liable for *mere* error of judgment, much less does it make him an insurer of the property. If he has exercised the care and judgment of ordinary prudent men in their own affairs, he will not be chargeable for his mere errors of judgment, nor for accidental injuries and losses. This rule con-

the claim on behalf of these directors is, that they can only be held responsible in this action for the consequences of their gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning—as something nearly approaching fraud or bad faith—I can not yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them. It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests, and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally means, gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case." [He then quotes from Scott v. Depeyster, 1 Edw. Ch. 513, 543; Hodges v. New Eng. Screw Co., 1 R. I. 312; S. C., 3 Id. 9; Litchfield v. White, 3 Sandf. 545; and Charitable Corp'n v. Sutton, 2 Atk. 405; all of which directly sustain his petition, and continues:] "In the Scotch case of the Liquidators of the Western B'k v. Douglas, 11 Session Cases (3d series), 112, it is said: 'Whatever the duties [of trustees and directors] are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that *gross* negligence in the performance of such a duty, *the want of reasonable and ordinary fidelity and care*, will impose liability for loss thereby occasioned.' In Spering's Appeal, 71 Pa. St. 11, Judge Sharswood said: 'They [the directors] can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are, therefore, bound to apply ordinary skill and diligence, but no more;' and added, that the directors 'are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body.' As I understand this language, I can not assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he can not set up that he did not possess them. When damage is caused by his want of judgment, he can not excuse himself by alleging his gross ignorance."

The language of some able decisions may, when carelessly read, be misleading. They speak of "gross" negligence as the measure of a trustee's liability, but at the same time define "gross" negligence as merely being the want of ordinary care. Thus, in the Scotch case quoted above, "gross negligence" is made to be synonymous with "the want of reasonable and ordinary care and fidelity." A few subsequent cases have taken a portion of this rule—the gross negligence—apparently without adverting to the definition thus given of the term. Spering's Appeal, 71 Pa. St. 11, referred to by Mr. Justice Earl, may be regarded as an illustration. It may be difficult, perhaps, to reconcile the different passages of Judge Sharswood's opinion in this case. So far as it holds the trustee liable only for gross negligence, using that word in any other sense than the want of ordinary care, it is unsupported by authority. The English courts have abandoned the three grades of gross,

cerning the extent and limits of the trustee's duty to use care, diligence, and prudence applies to all his transactions in connection with the trust, and all his dealings with the trust property, by which the interests of the beneficiary can be affected. If some of the particular rules concerning the making and retaining of investments seem to be more stringent,

ordinary, and slight negligence. The modern English decisions have entirely abrogated the doctrine so often laid down in books, that an uncompensated mandatary or other bailee is only bound to use slight care, and is only liable for gross neglect; they hold that such mandatary or bailee *may* be bound to use great care, and is always obliged to use all the care and skill which he actually possesses. (See Wilson v. Brett, 11 M. & W. 113, 115, *per* Rolfe, B.; Hinton v. Dibbin, 2 Q. B. 646, 661, *per* Lord Denman; Wyld v. Pickford, 8 M. & W. 443, 461, 462, *per* Parke, B.; Grill v. Central Iron etc. Co., L. R., 1 C. P. 600, 612, 614, *per* Willes and Montague Smith, JJ.) On every consideration of principle as well as upon authority, the same doctrine must apply to trustees. The case of Turquand v. Marshall, L. R., 4 Ch. 376, gives no support whatever to the broad doctrine as laid down by Judge Sharswood. The *decision* of the court is simply that on the bill framed upon charges of misrepresentation against the directors, relief can not be granted for their negligence. Lord Hatherly does not discuss the general duties of directors, much less those of trustees; his dictum concerning the liability of the defendants for their dealings (p. 386) is based wholly upon the terms of their "deed of settlement" and the powers which it gave them in this particular case. The decision is not an authority upon the liability in general of trustees or directors for care and diligence. In the often quoted case of Clough v. Bond, 3 My. & Cr. 490, 496, Lord Cottenham states the rule in a very clear manner. He is speaking of the duty with reference to the safety and security of trust funds; but the same doctrine clearly applies to all dealings by a trustee with the affairs of the trust which may endanger the safety of the estate. "It will be found to be the result of all the best authorities upon the subject, that although a personal representative, acting strictly within the line of his duty, *and exercising reasonable care and diligence*, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, *if that line of duty be not strictly pursued*, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive."

While the general rule is thus settled, the courts constantly reiterate the truth that in its application each case must stand upon its own circumstances. The following citations are necessarily given as mere illustrations; in some, trustees have violated their duty; in others, they have erred (if at all) only in judgment. Kekewich v. Marker, 3 Macn. & G. 311 (discretion expressly given to the trustees, and and see *ante*, cases under § 1062); *In re* Beloved Wilkes's Charity, 3 Id. 440 (ditto); Barnett v. Sheffield, 1 De G. M. & G. 371, 379; Manser v. Dix, 8 Id. 703, 712; Forshaw v. Higginson, Id. 827, 832; Baud v. Fardell, 7 Id. 628; Harper v. Hayes, 2 De G. F. & J. 542; Dance v. Goldingham, L. R., 8 Ch. 902; Youde v. Cloud, Id., 18 Eq. 634; Vyse v. Foster, Id., 8 Ch. 309; *In re* Englefield etc. Co., Id., 8 Ch. D. 388; Massey v. Banner, 1 J. & W. 241, 247; Charitable Corp'n v. Sutton, 2 Atk. 400, 405; Overend v. Gibb, L. R., 5 H. L. 480, 484, 494; Pool v. Dial, 10 S. C. 440; Luigi v. Luchesi, 12 Nev. 306; Bacot v. Heyward, 5 S. C. 441; Carpenter v. Carpenter, 12 R. I. 544; Gilmore v. Tuttle, 32 N. J. 611; Russell v. Peyton, 4 Ill. App. 473; Haydel v. Hurck, 5 Mo. App. 267; Morrow v. Saline Co. Comm'rs, 21 Kans. 484; Adair v. Brimmer, 74 N. Y. 539; King v. Talbot, 40 Id. 76; 50 Barb. 453; Foscue v. Lyon, 55 Ala. 440;

they will be found, upon closer examination, to be applications of the same general doctrine, varied only by the nature and situation of the subject-matter. It results from the duty that a trustee *may* be held accountable for more property than that which actually came into his possession. He may be charged with rents, profits, interest, income, proceeds of sales, and the like, which he never in fact received, but which he might and should have received by the exercise of due and reasonable care, diligence, and prudence in his modes of dealing.[1] A trustee who pays the wrong party, will generally be liable to pay over again to those who are really entitled.[2]

§ 1071. **5. The Duty as to Investments.**—The general obligation under consideration finds it most striking and important application in the matter of the investment of trust funds. It is the trustee's duty to use diligence in investing the trust property so that it may produce as much income as possible, and also to use care and prudence in investing it in such securities as will render its loss highly improbable, even if not virtually impossible. From these somewhat antagonistic duties, arise two corresponding liabilities. If the trustee suffers moneys to lie idle in his hands, producing no income, when by a proper investment an income might have been obtained, and this continues for an unreasonably long time, he will be liable for the amount of income which he might and ought to have made by

Clark v. Anderson, 13 Bush, 111; Mansfield v. Alwood, 84 Ill. 497; Gettins v. Scudder, 71 Id. 86; Bowker v. Pierce, 130 Mass. 262; Hodges v. New England Screw Co., 1 R. I. 312; 3 Id. 9; Scott v. Depeyster, 1 Edw. Ch. 513, 543; Litchfield v. White, 3 Sandf. 545; Ackerman v. Emott, 4 Barb. 626, 645, 646; Ringgold v. Ringgold, 1 Har. & G. 11, 25; see, also, especially on that branch of the rule which frees trustees from liability for mere errors of judgment, Spering's Appeal, 71 Pa. St. 11; Miller v. Proctor, 20 Ohio St. 442; Godbold v. Branch Bank, 11 Ala. 191; Finlay v. Merriman, 30 Tex. 56, 62; Salter v. Salter, 6 Bush, 624, 638; Cross v. Petree, 10 B. Mon. 413; Ellig v. Naglee, 9 Cal. 683, 695; Thompson v. Brown, 4 Johns. Ch. 619, 627; Vanderheyden v. Young, 11 Johns. 150, 157; Griffith v. Follett, 20 Barb. 620, 634; Smith v. Rathbun, 22 Hun, 150.

[1] Mansfield v. Alwood, 84 Ill. 497; Ellig v. Naglee, 9 Cal. 684.

[2] Where a trustee acting in good faith, and even deceived by forged documents, pays trust funds to the wrong party, it is held that he must pay over again the amount, with interest, to those who are entitled. Ashby v. Blackwell, 2 Eden, 299, 302; Eaves v. Hickson, 30 Beav. 136; Sporle v. Barnaby, 10 Jur. N. S. 1142; Haydel v. Hurck, 5 Mo. App. 267; and where by mistake he pays capital to life tenants, instead of investing it and paying the income, he must make it good, but is entitled to be recouped out of their life interest in fixing the amount of the deficiency, Barratt v. Wyatt, 30 Beav. 442; Davies v. Hodgson, 25 Id. 177; Griffiths v. Porter, 25 Id. 236. Where an infant *cestui que trust* falsely represents himself to be of age, and thereby procures payment by the trustee of the amount payable on his becoming of age, he can not compel the trustee to pay over again when he attains twenty-one, Overton v. Banister, 3 Hare, 503; a *cestui que trust*, who is overpaid, must refund, Livesey v. Livesey, 3 Russ. 287; as to paying the wrong person, see also *ante*, cases under § 1067.

an investment, and will be charged with such amount by the court in the settlement of his accounts. On the other hand, if he has made an investment in improper securities, contrary to the settled rules of equity or the subject, and the principal has been wholly or partially lost through insolvency, or depreciation of value, or has failed to produce income, he will be held personally responsible for the loss or deficiency. If, however, an investment is made with the exercise of reasonable care, diligence, and business prudence, in the form, manner, and securities approved of by the rules of equity, a trustee will not be liable for losses which may occur through the destruction or depreciation of values.[1] The general duty involves two distinct elements, which will be separately examined—the necessity of making investments, and the proper kinds of securities in which the investments may be made.

§ 1072. **The Necessity of Making Investment.**—It is the trustee's imperative duty to render the trust property as productive as possible, consistent with its *security* and with the demands of ordinary business prudence and judgment. The rule is general therefore, that if he permits the money to remain in his own hands unproductive, for a period which, under the circumstances, is unreasonable, then he will be personally charged with the lawful interest which might and should have been obtained by the exercise of reasonable care and diligence; and if the principal fund should be wholly or partly lost in consequence of such unreasonable delay, he will be compelled to

[1] Robinson v. Robinson, 1 De G. M. & G. 247, 254–257 (where trustees simply neglect to invest moneys, they are chargeable only with the principal sum and lawful *interest* thereon); Att'y-Gen. v. Alford, 4 Id. 843 (ditto); *Ex parte* Geaves, 8 Id. 291; Lockhart v. Reilly, 1 De G. & J. 464; Lloyd v. Attwood, 3 Id. 614; Shepherd v. Mouls, 4 Hare, 500, 503, 504; Phillipson v. Gatty, 7 Id. 516; Clough v. Bond, 3 My. & Cr. 490, 496, 497; Mayor of Berwick v. Murray, 7 De G. M. & G. 497, 519; Burdick v. Garrick, L. R., 5 Ch. 233, 241; Blogg v. Johnson, Id., 2 Ch. 225, 228; Brown v. Gellatly, Id., 2 Ch. 751; Stewart v. Sanderson, Id., 10 Eq. 26; Pickard v. Anderson, Id., 13 Eq. 608 (consent of beneficiary); *In re* T——, Id., 15 Ch. D. 78; *Ex parte* Norris, Id., 4 Ch. 280; Stone v. Stone, Id., 5 Ch. 74; Budge v. Gummow, Id., 7 Ch. 719; *In re* British etc. Co., Id., 14 Ch. D. 335; Barney v. Saunders, 16 How. (U. S.) 535, 542, 543; Kimball v. Reding, 31 N. H. 352; Frey v. Frey, 17 N. J. Eq. 71, 72, 74; Schieffelin v. Stewart, 1 Johns. Ch. 620; Baker v. Disbrow, 18 Hun, 29; Brown v. French, 125 Mass. 410; Adair v. Brimmer, 74 N. Y. 539; *In re* Foster's Will, 15 Hun, 387; Roosevelt v. Roosevelt, 6 Abb. N. C. 447; Bowman v. Pinkham, 71 Me. 295; Nancrede v. Voorhis, 32 N. J. Eq. 524; Gilmore v. Tuttle, 32 Id. 611; Clark v. Anderson, 13 Bush, 111; Dockery v. French, 73 N. C. 420; Moore v. Mitchell, 2 Woods. 483; Kirby v. Goodykoontz, 26 Gratt. 298 (in the three preceding cases the investment was made in confederate securities); Bowker v. Pierce, 130 Mass. 262; Sherman v. Parish, 53 N. Y. 483 (acquiescence of the beneficiary); Ormiston v. Olcott, 84 Id. 339; Wiggins v. Howard, 83 Id. 613; Chesterman v. Eyland, 81 Id. 398.

make up the deficiency. Even when the instrument creating the trust prescribes a particular mode of investment—as for example, it directs that all the personal property should be converted into cash, and the proceeds invested in the purchase of land—the trustee can not be justified in suffering the cash to lie idle and unproductive, for an unreasonable length of time.[1]

§ 1073. **Kinds of Investments: When Particular Securities are Expressly Authorized.**—There are two cases to be considered: *first*, when the instrument creating the trust expressly authorizes investment in particular securities, or directs particular modes of investment; *secondly*, when the instrument is wholly silent with respect to the mode of investment, and the matter is left to the judgment of the trustee. In the first case, when the instrument itself directs the mode and nature of the investment, and designates the securities, the trustee is bound to follow these directions with scrupulous care, and if any loss of trust property is the result of his obedience, he is not at all responsible. A departure from the directions will entail liability for the losses which may be occasioned thereby. Even when a general discretion in the choice of securities is expressly given, it must be exercised with reasonable care and business prudence.[2]

[1] Robinson v. Robinson, 1 De G. M. & G. 247; Att'y-Gen. v. Alford, 4 Id. 843; Baud v. Fardell, 7 Id. 628; Paddon v. Richardson, Id. 563. *Ex parte* Geaves, 8 Id. 291; Bate v. Hooper, 5 Id. 338; Sculthorpe v. Tipper, L. R., 13 Eq. 232; *In re* British etc. Co., Id. 14 Ch. D. 335; Gilman v. Gilman, 2 Lans. 1; and see other cases in the last preceding note. If the trustee permits trust moneys to remain on deposit in a bank or in the hands of a third person for an unreasonable time, he is responsible for any loss. Lupton v. White, 15 Ves. 432; and see *ante*, § 1067, and cases cited. Or if he delays unnecessarily in collecting a demand and it is thereby lost. Grove v. Price, 26 Beav. 103; Ellig v. Naglee, 9 Cal. 683.

[2] Mortimore v. Mortimore, 4 De G. & J. 472; Baud v. Fardell, 7 De G. M. & G. 628; Paddon v. Richardson, 7 Id. 563; *In re* Langdale's Trust, L. R., 10 Eq. 39; Stewart v. Sanderson, Id., Id. 26; Pickard v. Anderson, Id., 13 Id. 608 (investing on mere personal security with consent of the beneficiary); Bethell v. Abraham, Id., 17 Id. 24 (even when trustees are clothed with discretion they can not invest in foreign funds or railway stocks); Lewis v. Nobbs, Id., 8 Ch. D. 591 (where trustees are expressly authorized to vary the trust funds and "to invest the same in any other funds or securities"); *In re* Chennell, Id., 8 Ch. D. 492; *In re* Wedderburn's Trusts, Id., 9 Id. 112; *In re* Peyton, Id., 7 Eq. 463; Clark v. St. Louis etc. R. R., 58 How. Pr. 21; Foscue v. Lyon, 55 Ala. 440; Bowman v. Pinkham, 71 Me. 295 (a trustee expressly authorized to invest as he shall think fit, can not buy land on credit, and bind the estate by his note given as trustee); Gilmore v. Tuttle, 32 N. J. Eq. 611 (a trustee clothed with discretion is liable for loss arising from his investment in second mortgages); Nancrede v. Voorhis, 32 Id. 524 (ditto); Adair v. Brimmer, 74 N. Y. 539; Denike v. Harris, 84 Id. 89.

A trustee can not loan on mere personal security unless authorized, Walker v. Symonds, 3 Sw. 1, 63, 80; Darke v. Martyn, 1 Beav. 525; Styles v. Guy, 1 Macn. & G. 422; but may do so when authorized, Paddon v. Richardson, 7 De G. M. & G. 563; Denike v. Harris, 84 N. Y. 89; but even then he can not lend to a co-trustee, unless *expressly* authorized,

§ 1074. **The Same: When no Directions are Given.**— Where the instrument of trust is silent as to the mode of investment, the rules governing the action of trustees may appear to be somewhat arbitrary, but are in reality based upon the clearest principles of justice and expediency. The law does not give to trustees the same freedom of choice in investments, which may be exercised by prudent business men in their own affairs. A business man of even more than average caution may and often does assume intentional risks in the investment of his own property; for the sake of obtaining a greater than ordinary income, he will often invest in such a manner that the risk of ultimate loss is considerable, and such speculative use of his property would not be regarded as illegitimate nor as deserving of any censure. For example, he may invest in the stocks of companies which promise, and with good fortune may pay large dividends, but which also may utterly fail. No such risk is permitted to the trustee. In the management and investment of trust property for the benefit of the *cestui que trust*, the law, while requiring some income, regards the security of the fund invested, and the certainty of a moderate *regular* income, as of paramount, of absolutely essential importance when compared with the amount of the income. It permits the trustee to assume no risks in his investment other than those which are inseparable from every species of property. Absolute freedom from risk is impossible. The most stable forms of property *may* lose their value; lands may depreciate; even nations may become bankrupt. From these risks which inhere in every kind of ownership, the law does not pretend to save the beneficiary; but from risks growing out of the uncertainty of speculative investments, the law does protect him by making the trustee personally responsible for all trust funds invested by him in such a manner. It is the settled rule of equity, in the absence of express directions in the instrument creating the trust, or of statutory permission, that trustees or executors can not invest trust property upon any mere personal security, nor upon the stocks, bonds, or other securities of private business corporations.[1]

——— v. Walker, 5 Russ. 7; and giving a trustee discretion as to investment does not authorize a loan on mere personal security, Pocock v. Reddington, 5 Ves. 794. Investment in corporation stock is not allowed unless expressly authorized, Trafford v. Boehm, 3 Atk. 440, 444; Howe v. Earl of Dartmouth, 7 Ves. 137, 150; where trustees invest in mortgages they are responsible for the value of the land and the sufficiency of the security at the time of the investment, Phillipson v. Gatty, 7 Hare, 516; but not for a subsequent depreciation, Nancrede v. Voorhis, 32 N. J. Eq. 524.

[1] Clough v. Bond, 3 My. & Cr. 490, 496, 497; Powell v. Evans, 5 Ves. 839; Tebbs v. Carpenter, 1 Madd. 290; *Ex parte* Geaves, 8 De G. M. &

Where no directions are given by the instrument of trust, the well-settled rule of the English courts of equity is, that the trustee should invest trust funds, and can only escape personal risk and liability by investing, in real estate securities, or in the public, governmental securities of the British government.[1] In the United States, while the rules are certainly not so stringent and invariable as in England, and while different regulations may prevail to some extent in different states, based partly upon statutory legislation, and partly upon the policy of encouraging local enterprises, the same fundamental principle of requiring permanent investments in real estate or governmental securities is generally recognized by the courts—at least, all speculative risks are forbidden.[2] Investments in first mortgages of im-

G. 291; Paddon v. Richardson, 7 Id. 563; and see cases cited in last preceding note. King v. King, 3 Johns. Ch. 552.

[1] Investment in municipal bonds, or in the governmental stocks, bonds, or funds of foreign countries, or in the stocks or bonds of corporations, is never *directed* by the court, nor permitted in the absence of authority given by the instrument of trust. Howe v. Earl of Dartmouth, 7 Ves. 137, 151; Hume v. Richardson, 4 De G. F. & J. 29; Baud v. Fardell, 7 De G. M. & G. 628; Dimes v. Scott, 4 Russ. 195; Holland v. Hughes, 16 Ves. 111; Raby v. Ridehalgh, 7 De G. M. & G. 104; Robinson v. Robinson, 1 Id. 247, 263; Mortimore v. Mortimore, 4 De G. & J. 472; Mant v. Leith, 15 Beav. 524; Harris v. Harris, 29 Id. 107; *In re* Colne Valley etc. R'y, 1 De G. F. & J. 53; Bethell v. Abraham, L. R., 17 Eq. 24; *In re* Rehoboth Chapel, Id., 19 Id. 180; *In re* Chennell, Id., 8 Ch. D. 492; *In re* Wedderburn's Trusts, Id., 9 Id. 112; Sculthorpe v. Tipper, Id., 13 Eq. 232; Budge v. Gummow, Id., 7 Ch. 719.

[2] The action of the American courts can best be illustrated by the facts of a few very recent and instructive decisions. In Adair v. Brimmer, 74 N. Y. 539, the subject was examined in a most able and exhaustive manner, and trustees were sternly held up to their duty. A testator had given an enormous estate to three trustees, with power to sell lands in their discretion, and to invest the proceeds. Among the lands was a large tract of undeveloped coal land in Pennsylvania, of which the testator owned one undivided third, the other two thirds being owned by M. and N., and the entire tract being worth from $1,000,000 to $1,400,000. The trustees conveyed their one third to M. and N. nominally for the price of $250,000. The sale was really made to enable M. & N. to organize a mining company, and the land was immediately conveyed by them to the company. Stock of this company was issued, and the trustees took such stock at its par value to the amount of $250,000 as the consideration for the sale of the land. The company went on to develop the coal mines, and was compelled to borrow money, and to that end it issued its bonds for several hundred thousand dollars, which the stockholders were obliged to take *pro rata*, and the trustees thus took a large amount of said bonds as security for money advanced by them to the company. The stock and the bonds became worthless, so that the coal land had in fact been totally lost to the trust estate. In their final accounting the trustees claimed that they were entitled to be credited with the $250,000 in the stock, and with the amount of the company's bonds which they had taken. The court *held* that the trustees had grossly violated their duty. They had no right to sell the land for such a speculative purpose; the power given them in the will to sell, only authorized them to sell for the purpose of carrying out the general objects of the trust, and of making the property certainly productive for the beneficiaries. Furthermore, they had no authority to invest the proceeds in such securities as the company's stock and bonds. They were to be charged with the

proved land are universally favored, and the trustee is not liable for any subsequent depreciation of value if the original security was sufficient. Indeed, investments of this form are generally required to be made by public officials, of trust moneys paid into court. Investments in second or other subsequent mortgages would be at the trustee's own peril. Trustees may always

market value of the land at the time of the sale, and with interest thereon at 6 per cent. computed with *annual rests*. The trustees having set up acquiescence by the beneficiaries in defense, it was further held that an acquiescence or assent of the beneficiaries, so as so relieve the trustees, could only avail when given after a full knowledge of all the facts, and a full understanding of all the beneficiaries' own rights in the matter—any assent given in the absence of such full knowledge and understanding was of no effect. King v. Talbot, 40 N. Y. 76; S. C., 50 Barb. 453, is also a very instructive case. Trustees held funds given by a will in trust to apply the interest to the maintenance, etc., of the beneficiaries during their minority, and on their coming of age, the principal and all accumulated interest were to be transferred to them absolutely. The trustees invested the principal moneys in certain securities, and on the beneficiaries coming of age, the trustees offered to deliver to them these same securities, which the beneficiaries refused to accept. There was no allegation that the trustees had acted in bad faith, and the only question was whether the investments were proper and such as the beneficiaries were bound to accept in discharge of the trustees' obligation. The court of appeals held the following propositions: Where trustees hold funds for investment for the benefit of *cestuis que trustent* who are to be supported out of the income thereof, the law, by its general principles, imposes on the trustees the duty of placing the funds in a position of security, of seeing that they produce interest, and of so keeping them that they may always be subject to future recall for the benefit of the *cestuis que trustent*. In a trust of this kind, it is not in accordance with the nature of the trust, nor a compliance with the requirements of ordinary prudence, for the trustee to place the principal of the fund in a condition in which it is necessarily exposed to the hazards of loss or gain, and in which, *by the very terms of the investment*, the principal sum is not to be returned at all. The investment by such a trustee in the stocks of canal, railroad, bank, insurance, and other such private corporations, is a violation of his trust duty. *Held*, therefore, where in such a trust the trustee had invested the principal of the fund in stocks of the Delaware & Hudson Canal Co., the N. Y. & Harlem R. R. Co., the N. Y. & New Haven R. R. Co., the Saratoga & Washington R. R. Co., and the Bank of Commerce, the beneficiaries were not bound to accept such investments, but could compel the trustees to pay over the principal fund, in cash, charged with interest at 6 per cent. per annum, computed with *annual rests*. [It may be remarked that all these companies were at the time in good, and some of them in very high credit.] Woodruff, J., said, that in such a case, where there were different kinds of investments, the beneficiaries were not restricted to accepting *all*, or rejecting all, but might accept some, and reject others, at their pleasure. Four judges were of opinion that, in the absence of statute, trustees holding funds for investment, without special directions, were bound to invest either in governmental or in real estate securities, according to the well-settled rule of equity in England; that any other investment would render the trustees personally liable in case of loss or depreciation. Three judges were of opinion that so stringent a *general* rule could not be regarded as a part of our law. The opinion of Mr. Justice Woodruff in this case upholds, in a most admirable manner, the high morality of equity in determining and enforcing the obligations of trustees towards their beneficiaries. Gilman v. Gilman, 2 Lans. 1. Large amounts of money were given by will to the executers as trustees, and they were directed by the will to invest it in United States stocks, or state, city, or town bonds, or in bonds and mortgages. They did not obey these instructions. They kept on hand, for

invest in the governmental securities of the state under whose jurisdiction they are, and in those of the United States; and perhaps an investment in the public securities of other states of the union, of which the credit is firmly established, may be permitted; but to any greater extent than this, investments in foreign securities are a violation of the trustee's duty. In some

years, large amounts on deposit in their individual names, and these deposits they frequently used in their own business; but all the sums thus used they returned to the estate, and charged themselves with interest thereon during the time they were using the same. They did not charge themselves with any interest on the large amounts remaining idle in bank. In excuse for not investing in the United States securities, they set up that the beneficiaries were opposed to any investments therein. *Held*, that this last allegation was no excuse; if they had invested in United States securities, even against the consent of the beneficiaries, they would have been fully justified; and at all events, there were other good securities, state and municipal, in which they might have invested according to the directions of the will. They were charged with interest on all balances remaining in their hands after a reasonable time, viz.: on all balances remaining on hand six months after allowing thirty days more for procuring investments. *Held*, further, that they would ordinarily be chargeable with compound interest on the trust funds which they had used in their own private business; but as none had been lost, and they had charged themselves with interest thereon, the court would not enforce this liability. [This was a mistaken leniency, since the beneficiaries were clearly entitled to the *profits* of the business made by the use of the trust funds.] Also, that while trustees and executors are entitled to be allowed for all sums reasonably expended in protecting the estate or in maintaining or defending litigations reasonably necessary for its protection, these defendants were not entitled to be reimbursed for their expenses in unsuccessfully resisting an application to compel them to account, and in resisting proceedings for contempt instituted against them for their neglect to obey an order to account. Chesterman v. Eyland, 81 N. Y. 398 (money paid into court and invested by officer of the court in a sufficient real estate mortgage; the officer not liable, although, by a great depreciation of value, the land turned out insufficient and part of the fund was lost); Denike v. Harris, 84 N. Y. 89; reversing S. C., 23 Hun, 213 (trust money loaned on the borrower's own promise, without any further security, according to express directions of a will); Ormiston v. Olcott, 84 N. Y. 339 (as a general rule investments of trust moneys in foreign securities, or in a manner which takes the fund beyond the reach of the court, as in mortgages on foreign lands, etc., is improper, and a trustee making such investment does so at his own peril. This rule is not absolutely without exception; it may give way under very special and imperative circumstances. An investment in mortgage on lands in another state, sustained under the peculiar circumstances as being the only mode by which the property could be saved); Sherman v. Parish, 53 N. Y. 483 (a married woman who is a *cestui que trust* may consent to an unauthorized investment so as to bar any action against her trustee); Wiggins v. Howard, 83 N. Y. 613; Foscue v. Lyon, 55 Ala. 440 (investment in mortgages on real estate is proper; a trustee directed to invest in stocks can not compel the beneficiary to accept land or chattels); Nancredo v. Voorhis, 32 N. J. Eq. 524 (a trustee invests in second mortgages at his own peril, but is not liable for depreciation in value of land when investment is made in first mortgages); Gilmore v. Tuttle, 32 N. J. Eq. 611 (trustee is liable for loss resulting from his investment in second mortgages); Clark v. Anderson, 13 Bush, 111 (a trustee is chargeable for all loss resulting from a change of investment made after the beneficiary had become of age and entitled to the control of the estate, also for funds invested in second mortgage bonds of a railroad, but not for loss from an unexpected depreciation of real estate where the investment was originally proper); Patteson v. Horsley, 29 Gratt. 263 (a trustee is liable

of the states, statutes permit investments in the municipal bonds of cities, counties, and towns of the state within whose jurisdiction the trustee acts. Wherever the principles of equity jurisprudence have been fully accepted by the courts, trustees are not allowed to invest in the stocks, bonds, and other securities of private corporations—certainly not without a statutory permission. Such unauthorized investments do not *ipso facto* render the trustees personally liable, where no loss ensues; but if any loss results they must make it good. Where, however, the trust provides for a transfer of the property to the beneficiaries, they are not bound to accept such unauthorized securities from the trustees, even though these securities are not at all depreciated in value. It should be carefully observed, in this connection, that if the beneficiary is *sui juris* and competent to bind himself, his consent to the irregular investment would be a justification of the trustee's action, and a waiver of all claim against him for resulting loss.[1]

§ 1075. **III. To Act with Good Faith. 1. The Duty not to Deal with Trust Property for his own Advantage.**—Absolute and most scrupulous good faith is the very essence of the trustee's obligation. The first and principal duty arising from this fiduciary relation, is to act in all matters of the trust wholly for the benefit of the beneficiary. The trustee is not permitted to manage the affairs of the trust, or to deal with the trust property, so as to gain any advantage, directly or indirectly, for himself, beyond his lawful compensation. The equitable rules which govern the *personal* dealings between trustees and all other fiduciaries and their beneficiaries—their contracts, purchases, gifts, and the like—have already been examined, and

for loss from investment in confederate securities); Dockery v. French, 73 N. C. 420 (ditto); Moore v. Mitchell, 2 Woods, 483 (ditto); Kirby v. Goodykoontz, 26 Gratt. 298 (ditto); Tucker v. The State, 72 Ind. 242 (an investment in the stock of corporations is improper and made at the trustee's own peril); Bowker v. Pierce, 130 Mass. 262 (a trustee who, in good faith and in the exercise of a sound discretion, retains an investment in railroad stock, when it is gradually falling in value, is not responsible for the depreciation, although the stock becomes worthless. This decision certainly does not represent the true doctrine of equity. It is directly opposed to the rule as settled, not only in England, but by the overwhelming weight of the highest American authority; see, also, Barney v. Saunders, 16 How. (U. S.) 535; Kimball v. Reding, 31 N. H. 352 (a very instructive case); Lovell v. Minot, 20 Pick. 116; Harvard Coll. v. Amory, 9 Pick. 446; Smith v. Smith, 4 Johns. Ch. 281, 445; Thompson v. Brown, Id. 619, 628; Ackerman v. Emott, 4 Barb. 626; Worrell's Appeal, 9 Barr. 508; Swoyer's Appeal, 5 Id. 377; Twaddell's Appeal, Id. 15; Murray v. Feinour, 2 Md. Ch. 418, 419; Evans v. Iglehart, 6 Gill. & J. 171, 192; Ellig v. Naglee, 9 Cal. 683.

[1] A married woman is competent to bind herself in this manner when a beneficiary. Sherman v. Parish, 53 N. Y. 483.

this branch of their general obligation to use good faith needs no further discussion.[1] It is equally imperative upon the trustee, in his dealings with trust property, not to use it in his own private business, not to make any incidental profits for himself in its management, and not to acquire any pecuniary gains from his fiduciary position. The beneficiary is entitled to claim all advantages actually gained, and to hold the trustee chargeable for all losses in any way happening, from a violation of this duty.[2]

§ 1076. **2. The Duty not to Mingle Trust Funds with his own Funds.**—This second important duty of good faith

[1] See *ante*, §§ 955–965.

[2] Thus, if a trustee or other fiduciary buys up a debt or incumbrance against the estate at less than its full amount, he can not retain the benefit of the discount, but can only credit himself with the sum actually paid. Pooley v. Quilter, 2 De G. & J. 327; 4 Drew. 184; Fosbrooke v. Balguy, 1 My. & K. 226; see *ante*, § 959. Using trust money in the trustee's own business, in trade or mercantile adventures, in stock speculations, in buying and selling land, and the like, is a breach of trust. Docker v. Somes, 2 My. & K. 655; Willett v. Blanford, 1 Hare, 253; Heathcote v. Hulme, 1 J. & W. 122; Moons v. De Bernales, 1 Russ. 301; San Diego v. San Diego etc. R. R., 44 Cal. 106, 112–116; Page v. Naglee, 6 Id. 241; Gunter v. Janes, 9 Id. 643, 660-662; Commonwealth v. McAlister, 28 Pa. St. 480.

The penalty for a violation of this duty may be imposed in any form necessary to a complete indemnification of the beneficiary. Where the trustee has used trust funds in his own business, in trade, speculation, has made profits, acquired property, and the like, the beneficiary may, if he elect, claim and secure the advantage, profits, property, etc., for his own benefit. If the gains, profits, or acquisitions of such dealings can not be ascertained with certainty, the trustee may be held liable to pay extra interest, and even compound interest. The beneficiary is not, however, permitted to claim both profits and interest; he is required to elect between the two. Finally, if the trustee uses trust funds for such improper purposes, and loses them in any manner, he will be obliged to make up the loss to an extent sufficient to give the beneficiary complete indemnity, not only for the principal, but also for the income or interest which ought to have been made by the exercise of good faith and ordinary business prudence. These conclusions are illustrated by the cases above cited, and also by those following. Robinson v. Robinson, 1 De G. M. & G. 247, 256, 257; *Ex parte* Geaves, 8 Id. 291; Lloyd v. Attwood, 3 De G. & J. 614; General Exch. B'k v. Horner, L. R., 9 Eq. 480; Whitney v. Smith, Id., 4 Ch. 513 (a trustee who also acted as solicitor in a transfer of certain trust property, can not be charged with profits which he made as acting solicitor); Ellis v. Barker, Id., 7 Ch. 104; Parker v. McKenna, Id. 10 Id. 96; Albion etc. Co. v. Martin, Id. 1 Ch. D. 580; *In re* Imperial Land Co., Id., 4 Id. 566; Land Credit Co. v. Lord Fermoy, Id., 8 Eq. 7; Williams v. Powell, 15 Beav. 461; Sweet v. Jeffries, 67 Mo. 420; Vason v. Beall, 53 Ga. 500; O'Halloran v. Fitzgerald, 71 Ill. 53; Roberts v. Moseley, 64 Mo. 507; Fulton v. Whitney, 66 N. Y. 548; 5 Hun, 16; Fast v. McPherson, 98 Ill. 496; Coltrane v. Worrell, 30 Gratt. 434; Morrow v. Saline Co. Comm'rs, 21 Kans. 484; Heath v. Waters, 40 Mich. 457; Malone v. Kelley, 54 Ala. 532 (both profits and interest not permitted); Baker v. Disbrow, 18 Hun, 29; Romaine v. Hendrickson, 27 N. J. Eq. 162; Blauvelt v. Ackerman, 20 Id. 141, 148, 149; Staats v. Bergen, 17 Id. 554, 562, 563; Trull v. Trull, 13 Allen, 407; Marsh v. Renton, 99 Mass. 132, 135; Schieffelin v. Stewart, 1 Johns. Ch. 620; Gilman v. Gilman, 2 Lans. 1; Diffenderffer v. Winder, 3 Gill & J. 311; Chapman v. Porter, 69 N. Y. 276; Barnes v. Brown, 80 Id. 527, 535; Duncomb v. N. Y. etc. R. R., 84 Id. 190; Davis v. Rock Creek etc. Co., 55 Cal. 359; Chamberlain v. Pacific Wool etc. Co., 54 Id. 103; and see cases in the two following notes.

includes not only the intentional use of trust funds in the trustee's own business, it prohibits the mixing the two funds together in one amount, the depositing trust moneys in his own personal account with his own moneys in bank, borrowing trust funds or going through the form of borrowing for his own use, mingling receipts and payments of trust moneys and his own moneys in his books of account, and all similar modes of combining or failing to distinguish between the two funds. The trustee may not thus mingle trust moneys with his own, even though he eventually accounts for the whole, and nothing is lost. The rule is designed to protect the trustee from temptation, from the hazard of loss, and of being a possible defaulter. When a trustee does mingle trust moneys with his own, the right and lien of the beneficiary attach to this entire combined fund as security for all that actually belongs to the trust estate. A violation of this duty subjects the trustee to the following liabilities: (1) If the mingling is followed by actual loss, accidental or otherwise, the trustee must make good the principal sum lost, together with interest, and perhaps with compound interest; (2) Where there has been no positive loss, but the whole funds, principal, profits, and proceeds, are in the trustee's hands in their mingled condition, the burden of proof rests upon him of showing most conclusively what portion is his, and whatever of the mixed fund, including both profits and principal, he can not thus show to be his own, even though it be the whole mass, will be awarded to the beneficiary. The beneficiary is always entitled to claim and receive the *actual profits* when they can be ascertained; (3) If it is difficult to distinguish the funds so as to tell the amount of profits or proceeds which is the beneficiary's share, the court may not only require the trustee to restore the principal which he has appropriated, but in place of the profits may compel him to pay interest compounded with rests annual, or semi-annual, or even more frequent, as the extent of his bad faith may seem to demand; (4) Even if the trustee voluntarily accounts for and restores all the principal that he has mingled with his own, the court will at all events charge him with interest thereon.[1]

[1] It should be observed that the trustee is liable for trust money lost while mingled with his own, or while being used in his own business, no matter how or by what cause the loss occurs. He may have used the utmost care and prudence in conducting the business, and the loss may have been the result of unforeseen, inevitable accident—he is still liable, since he is engaged in a positive violation of duty. Lupton v. White, 15 Ves. 432; Heathcote v. Hulme, 1 J. & W. 122; Mason v. Morley, 34 Beav. 471, 475; Frith v. Cartland, 2 H. & M 417; Pennell v.

§ 1077. **The Duty not to Accept any Position or Enter into any Relation, or Do any Act Inconsistent with the Interests of the Beneficiary.**—This rule is of wide application, and extends to every variety of circumstances. It rests upon the principle that as long as the confidential relation lasts, the trustee, or other fiduciary, owes an undivided duty to his beneficiary, and can not place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original *cestui que trust.* The rule applies alike to agents, partners, guardians, executors, and administrators, directors and managing officers of corporations, as well as to technical trustees. The most important phase of this rule is that which forbids trustees, and all other fiduciaries, from dealing in their own behalf with respect to matters involved in the trust, and this prohibition operates irrespectively of the good faith or bad faith of such dealing. It is, therefore, a gross violation of his duty for any trustee, or director, acting in his fiduciary capacity, to enter into any contract with himself connected with the trust or its management; such a contaact is voidable, and may be defeated or set aside at the suit of the beneficiary. If, however, the trustee's act, in violation of this rule, is not done in bad faith, and the beneficiary has received any benefit therefrom, it can not be avoided without a restoration to the trustee of what has thus been received.[1] As another application of the

Deffell, 4 De G. M. & G. 372; Ernest v. Croysdill, 2 De G. F. & J. 175; *Ex parte* Geaves, 8 De G. M. & G. 291; Cook v. Addison, L. R., 7 Eq. 466, 470 ("it is a well-established doctrine in this court, that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so as that they can not be separated with perfect accuracy, he is liable for the whole"); Woodruff v. Boyden, 3 Abb. N. C. 29; Malone v. Kelley, 54 Ala. 532; Davis v. Coburn, 128 Mass. 377; Marine B'k v. Fulton B'k, 2 Wall. 252; Case v. Abeel, 1 Paige, 393; Utica Ins. Co. v. Lynch, 11 Id. 520; Mumford v. Murray, 6 Johns. Ch. 1; Kip v. Bank of N. Y., 10 Johns. 63; Comm. v. McAlister, 28 Pa. St. 480; Gunter v. Janes, 9 Cal. 643, 660–662 (a very instructive case); Livingston v. Wells, 8 S. C. 347.

[1] Since the applications of this duty to corporation direct rs and officers are very important and frequent, it will be proper to make a brief quotation from one or two very recent cases. In Duncomb v. N. Y., H. & N. R. R., 84 N. Y. 190, 198, the court said: "It is not intended to deny or question the rule that, whether a director of a corporation is to be called a trustee or not in a strict sense, there can be no doubt that his character is fiduciary, and that he falls within the doctrine by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon such party to deal on his own behalf in respect to any matter involving such confidence. Nor is it at all questioned that, in such cases, the right of the beneficiary or those claiming through him to avoidance does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly (Davoue v. Fanning, 2 Johns. Ch. 260). But the rule was adopted to secure justice,

general doctrine, a trustee is bound to communicate to his beneficiary any knowledge or information he may have obtained affecting the beneficiary's interests so far as they are embraced in or depend upon the trust or confidential relation.

§ 1078. **4. The Duty not to Sell Trust Property to Himself nor to Buy from Himself.**—This particular duty has already been fully discussed. It has been shown that where a trustee deals directly with his beneficiary by way of purchase or sale, the transaction is presumptively invalid; and that where a trustee with authority to sell, directly or indirectly purchases the property for himself behind his beneficiary's back, or where a trustee with authority to buy, purchases the property in such a manner from himself, in each case the transaction may be avoided by the beneficiary, unless he has ratified it with full knowledge of all the facts.[1]

§ 1079. **IV. Breach of Trust and Liability Therefor.**—It might be supposed that the term "breach of trust" was confined to willful and fraudulent acts, which have a *quasi* crim-

not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent. Thus the beneficiary may avoid the act of the trustee, but can not do so without restoring what he has received (York Co. v. Mackenzie, 8 Bro. P. C. 42). To cling to the fruits of the trustee's dealing while seeking to avoid his act; to take the benefit of his loan, and yet avoid and reverse its security, would be grossly inequitable and unjust." The court held that the rule does not apply where a trustee or director simply takes collateral security for a debt justly due to him, or for a liability justly incurred by him. See, also, Barnes v. Brown, 80 N. Y. 527, 535, *per* Earl, J. The following cases illustrate the general duty in its various applications: Aberdeen R'y v. Blaikie, 1 Macq. 461; Lloyd v. Attwood, 3 De G. & J. 614 (trustees bound to give full information); Imperial etc. Ass'n v. Coleman, L. R., 6 Ch. 558; Flanagan v. Great West. R'y, Id., 7 Eq. 116, 123; Albion etc. Co. v. Martin, Id., 1 Ch. D. 580; Twin-Lick Oil Co. v. Marbury, 1 Otto, 587; Risley v. Indianapolis etc. R. R., 62 N. Y. 240; Hoyle v. Plattsburgh etc. R. R., 54 Id. 314, 328; Butts v. Wood, 37 Id. 317; Smith v. Lansing, 22 Id. 520, 531; Gardner v. Ogden, Id. 327; Fulton v. Whitney, 66 Id. 548; N. Y. Central Ins. Co. v. Nat. Protec. Ins. Co., 14 Id. 85; St. James' Ch. v. Ch. of the Redeemer, 45 Barb. 356; Davis v. Rock Creek etc. Co., 55 Cal. 359; Chamberlain v. Pac. Wool etc. Co., 54 Id. 103; San Diego v. San Diego etc. R. R., 44 Id. 106, 112–116; Stewart v. Lehigh Val. R. R., 9 Vroom. 505; Gardner v. Butler, 30 N. J. Eq. 702; Sweet v. Jeffries, 67 Mo. 420; Roberts v. Moseley, 64 Id. 507; O'Halloran v. Fitzgerald, 71 Ill. 53; Fast v. McPherson, 98 Id. 496; Morrow v. Saline Co. Comm'rs, 21 Kans. 484.

[1] See *ante*, §§ 958–965; 1049-1052. See, also, *In re* Bloye's Trust, 1 Macn. & G. 488; Knight v. Marjoribanks, 2 Id. 10; Hickley v. Hickley, L. R., 2 Ch. D. 190; Ellis v. Barker, Id., 7 Ch. 104; Boerum v. Schenck, 41 N. Y. 182 (when a trustee to sell has himself purchased the trust property, the mere receipt and acceptance of the proceeds by the beneficiary is not such a ratification as will prevent him from avoiding the sale); Munn v. Berges, 70 Ill. 604; Bush v. Sherman, 80 Id. 160; Star Fire Ins. Co. v. Palmer, 41 N. Y. Super. Ct. 267; Spencer's Appeal, 80 Pa. St. 317; Tatum v. McLellan, 50 Miss. 1; Union Slate Co. v. Tilton, 69 Me. 244; James v. James, 55 Ala. 525; Higgins v. Curtiss, 82 Ill. 28; Ferguson v. Lowery, 54 Ala. 510.

inal character, even if they have not been made actual crimes by statute. The term has, however, a broader and more technical meaning. It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. The term therefore includes every omission or commission which violates in any manner either of the three great obligations already described: of carrying out the trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith. This broad conception of breach of trust, and the liabilities created thereby, are not confined to trustees regularly and legally appointed; they extend to all persons who are acting trustees, or who intermeddle with trust property.[1] In order that a trustee may be personally liable for a breach of trust, he must be *sui juris*.[2]

§ 1080. **Nature and Extent of the Liability.**—It has already been shown that a beneficiary may always claim and reach the trust property through all its changes of form while in the hand of the trustee, and that he may also follow it into the possession and apparent ownership of third persons, until it has been transferred to a *bona fide* purchaser for valuable consideration and without notice; and that a court of equity will furnish him with all the incidental remedies necessary to enforce his claim and to render it effective.[3] In addition to this claim of the beneficiary upon the trust estate as long as it exists, the trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which the beneficiary may enforce at his election, and which becomes his only remedy whenever the trust property has been lost or put beyond his reach by the trustee's wrongful act. The trustee's personal liability to make compensation for the loss occasioned by a breach of trust, is a simple contract equitable debt.[4] It may

[1] Rackham v. Siddall, 1 Macn. & G. 607; Lord v. Wightwick, 4 De G. M. & G. 803; Life Ass'n of Scotland v. Siddal, 3 De G. F. & J. 58; Pearce v. Pearce, 22 Beav. 248; Hennessey v. Bray, 33 Id. 96.

[2] Where the common law disabilities of coverture prevail, a married woman does not become personally liable for her breach of trust. Underwood v. Stevens, 1 Meriv. 712, 717; Cresswell v. Dewell, 4 Giff. 460; Wainford v. Heyl, L. R., 20 Eq. 321; although her separate estate might be liable under some circumstances; see Brewer v. Swirles, 2 Sm. & G. 219; Fletcher v. Green, 33 Beav. 426; as to wrongful investments made with her consent, see Cocker v. Quayle, 1 Russ. & M. 535; Kellaway v. Johnson, 5 Beav. 319. An infant is not in general liable for a breach of trust, Whitmore v. Weld, 1 Vern. 326, 328; Hindmarsh v. Southgate, 3 Russ. 324; unless it was intentional and fraudulent, Cory v. Gertcken, 2 Madd. 40; Wright v. Snowe, 2 De G. & Sm. 321.

[3] See *ante*, §§ 1048–1058.

[4] Vernon v. Vawdry, 2 Atk. 119; Adey v. Arnold, 2 De G. M. & G.

be enforced by a suit in equity against the trustee himself, or against his estate, after his death, and the statute of limitations will not be admitted as a defense unless the statutory language is express and mandatory upon the court. The amount of the liability is always sufficient for the complete indemnification and compensation of the beneficiary.[1]

§ 1081. **Liability among Co-trustees.**—I do not now speak of the liability *for* the acts or defaults of a co-trustee, but assume that co-trustees have concurred in a breach of trust. The rule is firmly settled that where a breach of trust has affected two or more or all of co-trustees with a common liability, they are liable jointly and severally; each is liable for the whole loss sustained or the whole amount due, and a decree obtained against them jointly may be enforced against any one of them.[2] Wherever two or more co-trustees are thus jointly and

432; Lockhart v. Reilly, 1 De G. & J. 464; Obee v. Bishop, 1 De G. F. & J. 137; *Ex parte* Blencowe, L. R., 1 Ch. 393; Holland v. Holland, Id., 4 Ch. 449; Wynch v. Grant, 2 Drew. 312; Benbury v. Benbury, 2 Dev. & Bat. Eq. 235, 238. The distinction between specialty debts and simple contract debts in the settlement of estates being generally abolished in this country, the liability of the trustee may properly be described as an equitable contract liability or debt—that is, an equitable liability of the same nature as that arising from breach of contract.

[1] The general doctrines concerning the trustee's liability for profits, for interest, simple or compound, and for the funds lost or misapplied, have been stated in the foregoing paragraphs. For a more detailed discussion of these rules, especially as to interest, the reader must be referred to the various treatises upon trusts. As to the liability of the trustee's estate after his death, and the defense of the statute of limitations, see Devaynes v. Robinson, 24 Beav. 86; Brittlebank v. Goodwin, L. R., 5 Eq. 545; Wood v. Weightman, Id., 13 Eq. 434; Taylor v. Cartwright, Id., 14 Eq. 167; Burdick v. Garrick, Id., 5 Ch. 233; Stone v. Stone, Id., 5 Ch. 74; Dixon v. Dixon, Id., 9 Ch. D. 587; Pinson v. Gilbert, 57 Ala. 35; Rowe v. Bentley, 29 Gratt. 756. As to the liability in general, see Robinson v. Robinson, 1 De G. M. & G. 247 (for interest); Att'y-Gen. v. Alford, 4 De G. M. & G. 843 (ditto); Cosser v. Radford, 1 De G. J. & S. 585; Bostock v. Floyer, L. R., 1 Eq. 26 (liable for fraud of his attorney); Sutton v. Wilders, Id., 12 Eq. 373 (ditto); Hopgood v. Parkin, Id., 11 Eq. 74 (liable for the negligence of his attorney); *In re* Grabowski's Settlement, Id., 6 Eq. 12 (for compound interest); Cook v. Addison, Id., 7 Eq., 466; Beaty v. Curson, Id., 7 Eq. 194; Jacubs v. Rylance, Id., 17 Eq. 341; Livingston v. Wells, 8 S. C. 347; Leedom v. Lombaert, 80 Pa. St. 381; Brown v. Lambert's Adm'r, 33 Gratt. 256; and see cases cited under the last preceding paragraphs.

[2] Wilson v. Moore, 1 My. & K. 126; Lyse v. Kingdon, 1 Coll. 184, 188; Att'y-Gen. v. Wilson, Cr. & Ph. 1, 28; Lawrence v. Bowle, 2 Ph. 140; Fletcher v. Green, 33 Beav. 426; Rehden v. Wesley, 29 Id. 213, 215; Burrows v. Walls, 5 De G. M. & G. 233; Wiles v. Gresham, Id. 770; *Ex parte* Geaves, 8 Id. 291; Lockhart v. Reilly, 1 De G. & J. 464; Case v. James, 3 De G. F. & J. 256; Turquand v. Marshall, L. R., 6 Eq. 112; Sculthorpe v. Tipper, Id., 13 Id. 232; Ashhurst v. Mason, Id., 20 Id. 225; *Ex parte* Norris, Id., 4 Ch. 280; Budge v. Gummow, Id., 7 Id. 719; Ellis v. Barker, Id., 7 Id. 104; Evans v. Bear, Id., 10 Id. 76; Butler v. Butler, Id., 5 Ch. D. 554; 7 Id. 116; *In re* Englefield etc. Co., Id., 8 Id. 388; Land Credit Co. v. Lord Fermoy, Id., 8 Eq. 7, 11, 13; 5 Ch. 763; Hun v. Cary, 82 N. Y. 65; Weetjen v. Vibbard, 5 Hun, 265; Heath v. Waters, 40 Mich. 457 (where one trustee deals with another person

severally liable in the same amount for a breach of trust which is not purely tortious in its nature—as where it consists in a failure to carry out the directions of the trust, or a failure to make proper investments, or other like acts of omission or commission which are not fraudulent, or do not involve a willful breach of good faith—a right of contribution exists among themselves; and if one of them has paid the amount of liability, he may enforce a contribution from the others in a suit brought for that purpose. In such cases, upon the general principles of equity pleading, all the trustees who are liable should be joined as defendants in a suit brought by the beneficiary; the contribution, however, can not be *enforced* in that suit.[1] Where, on

whom he knows to be also a trustee, in such a manner as amounts to a breach of the latter's trust, both are affected with an equitable liability); see, also, on the general subject of the trustees' liability, Townley v. Sherborne, Bridg. Rep. 35; Brice v. Stokes, 11 Ves. 319; 2 Eq. Lead. Cas. 1738, 1748, 1791 (4th Am. ed.), and notes of the English and American editors.

[1] This rule is sometimes laid down in the broadest terms, as though the right of contribution was universal, existing in every instance of liability among co-trustees for any breach of trust. This is certainly erroneous, since the distinction mentioned in the text is clearly made by the decisions. The general language of judicial opinions in stating the rule should always be interpreted by the facts of the case before the court. It has also been said that the defaulting trustees should all be joined as defendants in a suit by the beneficiary, in order that the contribution among them might be settled and enforced by the one decree. This view is not sustained by the decisions. Many of the authorities which recognize the right of contribution, declare in the most positive manner that it can not be enforced among the defendants in the suit brought against them by the beneficiary. The true reason for making them all parties is, that they may be bound by the decree which fixes the amount of the liability for which they must contribute. See Perry on Trusts, §§ 848, 876. The leading case on the subject of contribution is Lingard v. Bromley, 1 V. & B. 114, 117. Two trustees were sued and a decree was obtained against them jointly for not conveying certain property. The M. R. said: "Where damages are recovered against several defendants guilty of a tort, a court of justice will not enforce a contribution among them; but here is nothing but the non-performance of a civil obligation. The trustees were bound to convey; a loss was occasioned by their not conveying, and they were bound to make good that loss. The liability, therefore, was not at all *ex delicto*." He goes on to show that there was not the slightest fraud in the defendants' default, and they were entitled to a contribution. The whole reasoning indicates the ground upon which the right of contribution is placed to be the absence of any tortious character in the defendants' breach of trust. In Sherman v. Parish, 53 N. Y. 483, 489, defendant was sued for an alleged breach of trust in not making proper investments. The court held that the fault, if any, was entirely that of the defendant's co-trustee, who was not made a party defendant, and that the defendant was not at all liable. Folger, J., added: "It is quite clear that if defendant had been held to answer in the first instance to the plaintiff, he should have recompense from the estate of the active trustee, contribution from that of the co-trustee equally in fault, and be enabled to pursue and recover the fund in the securities in which it has been put." He goes on to say that the other co-trustee was a necessary party, and seems to intimate as the reason, that the court might by its decree in the same suit, adjust the rights and enforce the contribution between the defendants themselves. This whole statement is an *obiter dictum;* but the rule which it lays down concerning the right of contribution is undoubtedly correct

the other hand, the breach of trust concurred in by several co-trustees is tortious in its nature, as where it is actually fraudulent, or consists in an intentional misappropriation of trust funds to the trustees' own use, or in any other willful violation of good faith, or perhaps in gross and culpable negligence occasioning a loss, there is no right of contribution among the trustees; the beneficiary may at his election sue one or more of the wrong-doers without joining all who are liable.[1]

when confined to such cases as the one then before the court. The conclusion which the learned judge reaches, that the contribution would be enforced by the decree in the suit brought by the beneficiary, is certainly not supported by the *decisions* which he cites. See, also, Coppard v. Allen, 2 De G. J. & S. 173, 177, *per* Turner, L. J.; Fletcher v. Green, 33 Beav. 513, 515 (while admitting the right of contribution, expressly holds that "the equities of the defendants as between themselves can not be determined in this suit" brought by the *cestui que trust*); Att'y-Gen. v. Daugars, 33 Beav. 621, 624 (same rule); Perry v. Knott, 4 Id. 179, 180 (holds that all the defaulting trustees should be made parties, not because contribution could be enforced in this suit, for it could not; "but if they were all present, the amount due would be settled in the presence of all, and *in a subsequent suit for contribution*, the amount would already have been conclusively decided"); Pitt v. Bonner, 1 Y. & C. Ch. 670 (a contribution as to costs by the defendants was decreed *by consent* of the parties on motion in the same suit); Wilson v. Goodman, 4 Hare, 54; Munch v. Cockerell, 8 Sim. 219 (all the defaulting trustees are, in general, necessary parties defendant in a suit for a breach of trust); Priestman v. Tindall, 24 Beav. 244; Baynard v. Woolley, 20 Id. 583; Birks v. Micklethwait, 33 Id. 409.

[1] In Att'y-Gen. v. Wilson, Cr. & Ph. 1, 28, a suit was brought against a portion of a body of trustees who had been guilty of a willful misappropriation of trust funds, and of gross negligence in the management of the trust estate. The objection was urged, with great earnestness, that all the wrong-doing trustees should have been made defendants, and that the suit could not be sustained against a part of them only. Lord Cottenham laid down the rule in the following emphatic manner, and his conclusions are founded upon plain and settled principles: "It was then urged that all the governing body, at least all who took any part in these transactions, ought to be co-defendants. Upon this point also Lord Hardwicke's authority in the Charitable Corporation Case (2 Atk. 400, 406) is of the highest value. It was urged that, as the injury had arisen from the misconduct of many, each ought to be answerable for so much only as his particular misconduct had occasioned; but Lord Hardwicke said: 'If this doctrine should prevail, it is indeed laying the axe to the root of the tree. But if upon inquiry, there should appear to be supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty; nor will I ever determine that a court of equity can not lay hold of every breach of trust, let the person guilty of it be either in a private or a public capacity.' In cases of this kind, where the liability arises from the wrongful act of the parties, each is liable for all the consequences, *and there is no contribution between them*, and each case is distinct, depending upon the evidence against each party. It is, therefore, not necessary to make all parties who may more or less have joined in the act complained of; nor would any one derive any advantage from their being all made defendants, because, as the decree would be general against all found to be guilty of the charge, it might be executed against any of them. It is evident that Lord Hardwicke, in the case of the Charitable Corporation, considered that each defendant would be liable for each transaction in which he had been a party." He also cites Att'y-Gen. v. Brown, 1 Sw. 265, decided by Lord Eldon as sustaining his conclusion. The same distinction was recognized and followed, and declared to be the well-settled rule, in Cunningham v. Pell, 5 Paige, 607, *per* Wal-

§ 1082. **Liability for Co-Trustees.**—The general theory of equity is that each one of several trustees has the same rights as the others with respect to the possession, control, and management of the trust property. It follows as a necessary consequence of this conception, and the general rule is well settled, that each trustee is generally liable only for his own conduct in dealing with the affairs of the trust; he is not responsible for the acts or defaults—the intentional or negligent breaches of trust—of a co-trustee, in which he has not joined or concurred, or to which he has not consented, or which he has not aided or made possible by his own negligence.[1] Where a trustee, who is not really an acting one, joins merely for the sake of conformity, with his co-trustees who are acting, in receipts given for money, he is not liable with respect to such money to the beneficiary.[2] The foregoing statement of the general doctrine shows that a trustee is not absolutely and under all circumstances free from liability with respect to his co-trustees. A trustee is responsible for the willful or negligent wrongful acts

worth, Ch., and in Heath v. Erie R. R. Co., 8 Blatch. 347; Smith v. Rathbun, 22 Hun, 150.

[1] Townley v. Sherborne, Bridg. Rep. 35; Brice v. Stokes, 11 Ves. 319; 2 Eq. Lead. Cas. 1738, 1748–1790, 1791–1805 (4th Am. ed.) The English and American authorities are collected in the editor's notes. Derbishire v. Home, 3 De G. M. & G. 80 (not liable for moneys which come into the hands of a co-trustee); Paddon v. Richardson, 7 Id. 563 (money having been loaned to a co-trustee in pursuance of express directions of the trust, the omission of the other trustee to compel its repayment, did not render that other trustee liable for its loss, in the absence of any misconduct on his part); Barnard v. Bagshaw, 3 De G. J. & S. 355 (trustees are not liable for moneys which a co-trustee gets into his possession without their consent or knowledge and by a fraud upon them); Land Credit Co. v. Lord Fermoy, L. R., 5 Ch. 763, reversing S. C., 8 Eq. 7 (a director is not liable for a breach of trust by the other directors of which he had no knowledge); Cargill v. Bower, L. R., 10 Ch. D. 502, 514 (a director of a company is not liable for a fraud committed by his co-directors, unless he has either authorized it or tacitly permitted it); Williams v. Nixon, 2 Beav. 472; Att'y-Gen. v. Holland, 2 Y. & C. Ex. 683; Kip v. Deniston, 4 Johns. 23; and see Mendes v. Guedalla, 2 J. & H. 259; Cottam v. East. Cos. R'y, 1 Id. 243; Trutch v. Lamprell, 20 Beav. 116; Baynard v. Woolley, 20 Id. 583; Griffiths v. Porter, 25 Id. 236; Eager v. Barnes, 31 Id. 579. It seems to be settled in New York that where persons are at once executors and trustees, the liability of one for the acts of the other is the same as in the case of executors; that each is liable only for his own acts, and can not be made responsible for the default of another, unless he in some manner aided or concurred therein. Ormiston v. Olcott, 84 N. Y. 339, 346, citing Sutherland v. Brush, 7 Johns. Ch. 17, 22; Monell v. Monell, 5 Id. 283; Manahan v. Gibbons, 19 Johns. 427; Kip v. Deniston, 4 Id. 23; Banks v. Wilkes, 3 Sandf. Ch. 99; and disapproving of Bates v. Underhill, 3 Redf. 365.

[2] Brice v. Stokes, 11 Ves. 319, 324; Walker v. Symonds, 3 Sw. 1, 63; Gray v. Reamer, 11 Bush, 113; Sinclair v. Jackson, 8 Cow. 543; Peter v. Beverly, 10 Peters, 531, 562; 1 How. (U. S.) 134; Taylor v. Benham, 5 How. U. S.) 233; but he must prove affirmatively that he acted only for the sake of conformity; and even then he will be liable if he negligently permit his co-trustee to retain the trust money for his own uses, or to deal with it in violation of the trust. Brice v. Stokes, *supra;* Ingle v. Partridge, 32 Beav. 661.

or omissions—breaches of trust—of his co-trustee to which he consented, or which by his own negligence he made it possible for his co-trustee to commit. Every trustee is of course liable for the defaults of his co-trustee in which he has joined or concurred, but his liability then arises from his *own* actual breaches of trust, and not from those of his fellow-trustee. "With respect to the liability of a trustee for the acts of a co-trustee, there are three modes in which he may become liable according to the ordinary rules of the court. First, where one trustee receives trust money and *hands it over* to a co-trustee without securing its due application. Secondly, where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it. Thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution." It thus appears that the consent to a co-trustee's breach of trust need not be express; it may be implied from the trustee's conduct in refraining from taking reasonable and necessary steps to prevent or repair the loss.[1] In applying this general rule some of the American decisions do not hold trustees to quite so rigid a responsibility for mere omissions to interfere with the wrongful acts of their fellows, as is done by the English cases; but there does not appear to be any substantial difference in the modes of formulating the doctrine by the courts of the two countries.

§ 1083. **The Beneficiary Acquiescing or Concurring.**—A beneficiary who, subsequently to a breach of trust, acquiesces in it, can not maintain a suit for relief against those who would otherwise have been liable. The acquiescence, in order to pro-

[1] See *ante*, § 1069, as to negligent surrender of entire control to a co-trustee. Wilkins v. Hogg, 8 Jur. N. S. 25; French v. Hobson, 9 Ves. 103; Brice v. Stokes, 11 Id. 319, 324; Hovey v. Blakeman, 4 Id. 596; Sadler v. Hobbs, 2 Bro. Ch. 114; Boardman v. Mosman, 1 Id. 68; Joy v. Campbell, 1 Sch. & Lef. 328, 341; Broadhurst v. Balguy, 1 Y. & C. 16; Hanbury v. Kirkland, 3 Sim. 265; Mucklow v. Fuller, Jac. 198; Booth v. Booth, 1 Beav. 125; Styles v. Guy, 1 Macn. & G. 422, 430; Burrows v. Walls, 5 De G. M. & G. 233; Thompson v. Finch, 8 Id. 560, 563, 564; 22 Beav. 316; *Ex parte* Geaves, 8 De G. M. & G. 291; Case v. James, 3 De G. F. & J. 256; Mendes v. Guedalla, 2 J. & H. 259; Evans v. Bear, L. R., 10 Ch. 76; Lewis v. Nobbs, Id., 8 Ch. D. 591, 594; Spencer v. Spencer, 11 Paige, 299; Clark v. Clark, 8 Id. 152; Monell v. Monell, 5 Johns. Ch. 283, 296; Ehmendorf v. Lansing, 4 Id. 562; Banks v. Wilkes, 3 Sandf. Ch. 99; Mesick v. Mesick, 7 Barb. 120; Smith v. Rathbun, 22 Hun, 150; Bates v. Underhill, 3 Redf. 365; Schenck v. Schenck, 1 C. E. Green, 174; Irwin's Appeal, 11 Casey (35 Pa. St.), 294; Ducommun's Appeal, 5 Harris, 268; Jones's Appeal, 8 Watts & S. 141, 147; Pim v. Downing, 11 Serg. & R. 66; Wayman v. Jones, 4 Md. Ch. 500; Ringgold v. Ringgold, 1 Har. & G. 11; Latrobe v. Tiernan, 2 Md. Ch. 474; Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. 157; Worth v. McAden, 1 Dev. & Bat. Eq. 199; Graham v. Davidson, 2 Id. 155; Taylor v. Roberts, 3 Ala. 83, 86; Royall's Adm'r v. McKenzie, 25 Id. 363; Hall v. Carter, 8 Ga. 388; State v. Guilford, 15 Ohio, 593; Edmonds v. Crenshaw, 14 Peters, 166.

duce this effect, must take place with full information by the beneficiary of all the facts, and with full knowledge of his legal rights arising from those facts; in short, it must have all the requisites of an acquiescence heretofore described, to defeat the liability of a defaulting fiduciary.[1] Although, in general, lapse of time is not a defense to the beneficiary's right of action, yet a great delay after knowledge of the breach of trust may be a bar. If a *cestui que trust* is a party to, or concurs in, or even assents to, a breach of trust by the trustee, he debars himself thereby of all claim for relief.[2]

§ 1084. **Third. The Trustee's Compensation and Allowances.**—It is the well-settled doctrine of the English equity, that the trustee's office is, as a rule of law, wholly gratuitous. In the absence of a provision for compensation contained in the instrument creating the trust, he is not entitled to make any charge for his services, trouble, or loss of time, even though great ad-

[1] See *ante*, §§ 964, 965; Walker v. Symonds, 3 Sw. 1, 64; Wedderburn v. Wedderburn, 4 My. & Cr. 41; Munch v. Cockerrell, 5 Id. 178; Cockerell v. Cholmeley, 1 Russ. & M. 418, 425; Strange v. Fooks, 4 Giff. 408; Burrows v. Walls, 5 De G. M. & G. 233; Life Ass'n v. Siddal, 3 De G. F. & J. 58, 74; Farrant v. Blanchford, 1 De G. J. & S. 107, 119, 120; Aveline v. Melhuish, 2 Id. 288; Zambaco v. Cassavetti, L. R., 11 Eq. 439; Sleeman v. Wilson, Id., 13 Eq. 36; Jones v. Higgins, Id., 2 Eq. 538; Clark v. Clark, 8 Paige, 152; Banks v. Wilkes, 3 Sanf. Ch. 99; Monell v. Monell, 5 Johns. Ch. 283; Jones's Appeal, 8 Watts & S. 141, 147; Pim v. Downing, 11 Serg. & R. 66; Wayman v. Jones, 4 Md. Ch. 500; Ringgold v. Ringgold, 1 Harr. & G. 11; State v. Guilford, 15 Ohio, 593; Royall's Adm'r v. McKenzie, 25 Ala. 363. As to delay, see Bright v. Legerton, 2 De G. F. & J. 606; Hodgson v. Bibby, 32 Beav. 221; Clanricarde v. Henning, 30 Id. 175; Browne v. Cross, 14 Id. 105; Obee v. Bishop, 1 De G. F. & J. 137; Scott v. Haddock, 11 Ga. 258.

Acquiescence, assent, release, and like acts, in order to be operative, must be made by a *cestui que trust* who is *sui juris*. If a trustee relies upon a release or discharge given by the beneficiary, it is incumbent upon the trustee to show that he gave the *cestui que trust* full information as to all his rights; and it is, in fact, a part of the trustee's general duty to impart knowledge of his own legal rights to the beneficiary. March v. Russell, 3 My. & Cr. 31; Lloyd v. Attwood, 3 De G. & J. 614; Aveline v. Melhuish, 2 De G. J. & S. 288; Farrant v. Blanchford, 1 Id. 107, 119, 120; Williams v. Reed, 3 Mason, 405; Bond v. Bond, 7 Allen, 1; Negley v. Lindsay, 67 Pa. St. 217; Cumberland Coal Co. v. Sherman, 20 Md. 117.

[2] Mere knowledge, however, of a breach of trust, is not an assent, much less a concurrence. Brice v. Stokes, 11 Ves. 319; Walker v. Symonds, 3 Sw. 1, 64; March v. Russell, 3 My. & Cr. 31; Life Ass'n etc. v. Siddal, 3 De G. F. & J. 58, 61; Phipps v. Lovegrove, L. R., 16 Eq. 80; Town of Verona v. Peckham, 66 Barb. 103. Where there are several beneficiaries and one of them takes a part in a breach of trust, whereby a loss is occasioned, his interest in the trust property may be reached, retained, and applied to make good the loss for the benefit of the other beneficiaries; and this equity extends, not only to the interest while in the hands of the wrong-doing *cestui que trust*, but also to those claiming it under or through him. Woodyatt v. Gresley, 8 Sim. 180; Priddy v. Rose, 3 Meriv. 86; Williams v. Allen, 32 Beav. 650; and see Jacubs v. Rylance, L. R., 17 Eq. 341; Butler v. Carter, Id., 5 Eq. 276. If third persons are parties to a breach of trust, they are equally liable with the trustee. Dixon v. Dixon, L. R., 9 Ch. D. 587; Rolfe v. Gregory, 11 Jur. N. S. 98; Bridgman v. Gill, 24 Beav. 302.

vantage had resulted therefrom to the beneficiaries.[1] Where the trustee is also an attorney, and acts as such on behalf of the estate, he is even not entitled to full costs or attorney's fees as against the *cestui que trust*, but can only be allowed for costs actually out of pocket, or disbursements.[2] The testator, or other person who creates a trust, may expressly provide for a salary or compensation of any form to be paid to the trustee, and such provision will be binding and will be followed by the courts.[3] This stringent and certainly unwise rule of the English equity has not been followed in the United States. With very few, if any, exceptions among the various states, trustees as well as executors and administrators are allowed compensation for their services; in most of the states the right to the compensation and the amount of it have been fixed by statutory legislation. Where the instrument creating the trust provides that the trustee shall have a compensation for his services, such provision will be enforced. If the instrument declares the rate of compensation, it must be followed; if it establishes no rate, the trustee is entitled to a reasonable amount, which will be ascertained by means of a judicial investigation as to the value of his services.[4] Where no provision is made by the creator of the trust, the trustee is allowed the amount fixed by statute; or in the absence of statute the amount determined by the court to be reasonable and just.[5]

[1] Even a *settled* account which contained items of such charges would be set aside. Robinson v. Pett, 3 P. Wms. 249; 2 Eq. Lead. Cas. 512, 514–537 (4th Am. Ed.); note of English editor; Ayliffe v. Murray, 2 Atk. 58; Barrett v. Hartley, L. R., 2 Eq. 789; the court will sometimes, however, make an allowance for compensation in special cases. Forster v. Ridley, 4 De G. J. & S. 452; Marshall v. Holloway, 2 Sw. 432; and see Douglas v. Archbutt, 2 De G. & J. 148; Bainbrigge v. Blair, 8 Beav. 588.

[2] Cradock v. Piper, 1 Macn. & G. 664; New v. Jones, 1 Id. 668 n.; Broughton v. Broughton, 5 De G. M. & G. 160; Gomley v. Wood, 3 Jo. & Lat. 678, 688; Mayer v. Galluchat, 6 Rich. Eq. 1. This rule is applied also where the legal business is done by the trustee's partner, who is not himself a trustee. Lincoln v. Windsor, 9 Hare, 158; Christophers v. White, 10 Beav. 523; Lyon v. Baker, 5 De G. & Sm. 622. With regard to trustee's costs, see, also, King v. King, 1 De G. & J. 663; *In re* Woodburn's Will, 1 Id. 332; *Ex parte* Tomlinson, 3 De G. F. & J. 745; Smith v. Dresser, L. R., 1 Eq. 651; *In re* Whitton's Trusts, Id., 8 Eq. 352; Bowyer v. Griffin, Id., 9 Eq. 340; *In re* Elliot's Trusts, Id., 15 Eq. 194; *Ex parte* Angerstein, Id., 9 Ch. 479; Walters v. Woodbridge, Id., 7 Ch. D. 504.

[3] Webb v. Earl of Shaftesbury, 7 Ves. 480; Baker v. Martin, 8 Sim. 25. A contract for compensation between the trustee and the *cestui que trust may* be valid; but is treated as any other agreement by which a trustee obtains an advantage from his beneficiary —the most perfect good faith is required. Moore v. Frowd, 3 My. & Cr. 45, 48; Douglas v. Archbutt, 2 De G. & J. 148.

[4] In the Matter of Schell, 53 N. Y. 263, 265; Meacham v. Sternes, 9 Paige, 398; Wagstaff v. Lowerre, 23 Barb. 209.

[5] In the note of the American editor to Robinson v. Pett, 2 Eq. Lead. Cas. 512 538–600 (4th Am. ed.), the statutes of the various states and the decisions thereon are collected; see also

§ 1085. **Allowances for Expenses and Outlays.**—In addition to his compensation in this country, and without any compensation in England, the trustee is entitled to be allowed, as against the estate and the beneficiary, for all his proper expenses out of pocket, which include all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and, in the absence of any such directions, all expenses reasonably necessary for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust. He is also entitled to be indemnified in respect of all personal liabilities incurred by himself for any of these purposes.[1] Where a trustee properly advances money for any of the above-mentioned objects, so that he is entitled to reimbursement, he also has a lien as security for the claim, either upon the corpus of the trust property, or upon the income, as the case may be; but for moneys improperly paid there is no lien. Although in general a creditor who advances money to a trustee obtains only the personal liability of the trustee, and has no demand enforceable against the estate, yet if the expenditure is authorized, and the loan is necessary, the trustee may, at the time of procuring the advance, whether money or services, by an express agreement with the creditor, make the demand a charge upon the estate, and thus create a lien in favor of the creditor; or the trustee may so deal with the estate in the first instance as to acquire a lien in his own favor, and may then assign such lien to the creditor.[2] It is hardly necessary to add that the foregoing rules

Perry on Trusts, § 918. A person who is both executor and trustee, is not entitled to commissions by way of compensation in both capacities on the same fund for the same time. Hall v. Hall, 78 N. Y. 535. A trustee who commits a breach of trust is not entitled to commissions, Singleton v. Lowndes, 9 S. C. 465.

[1] He is thus entitled to be allowed for proper disbursements occasioned by the necessary employment of attorneys, agents, etc., Macnamara v. Jones, 2 Dick. 587; "Every trustee is entitled the necessary and proper expenses incurred in protecting the property committed to his care. If they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect but probable," Bright v. North, 2 Phil. 216, 220, *per* Lord Cottenham; Worrall v. Harford, 8 Ves. 4, 8; Phené v. Gillan, 5 Hare, 1, 9; Douglas v. Archbutt, 2 De G. & J. 148; Benett v. Wyndham, 4 De G. F. & J. 259 (indemnity against liability); Duncan v. Findlater, 6 Cl. & Fin. 894; Heriot's Hospital v. Ross, 12 Id. 507; Mersey Docks Trustees v. Gibbs, 11 H. L. Cas. 686; L. R., 1 H. L. 93; Jervis v. Wolferstan, L. R., 18 Eq. 18; Ellig v. Naglee, 9 Cal. 683; Beatty v. Clark, 20 Id. 11, 30; New v. Nicoll, 73 N. Y. 127.

[2] In New v. Nicoll, 73 N. Y. 127, 130, 131, the court held, *per* Earl, J.: "The general rule undoubtedly is, that a trustee can not charge the trust estate by his executory contracts, unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable, and the remedy is against him personally. But there are exceptions to this general rule. When a trustee is authorized to make an expenditure

concerning compensation, allowances, and liens, do not apply to trustees *in invitum*. Since their paramount duty is to convey the property at once to the beneficial owner, they are clearly not entitled to be reimbursed for expenditures made, much less to be allowed compensation, while they are violating this obligation.

§ 1086. **Fourth. Removal and Appointment of Trustees.**—The power of courts of equity over the removal and appointment of trustees, independently of any statutory authority, or any directions in the instrument of trust, is well established.[1]

and he has no trust funds, and the expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may by express agreement make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can by express contract transfer this lien to any other party who may upon the faith of the trust estate make the expenditure." It was further held that where there was no original agreement giving a lien to the creditor, and no assignment by the trustee of his own lien, so that the creditor merely relied upon the trustee's personal liability, a lien upon the estate in favor of the creditor could not be created by the trustee's mere subsequent promise. In Ellig v. Naglee, 9 Cal. 683, it was held that, where the trustee makes advances out of his own funds to the beneficiary, with the understanding that he should be repaid out of the rents and profits, he obtains a lien upon the future income, but not upon the *corpus* of the trust property; and the same is true of necessary advances made under like circumstances for the protection of the estate. Beatty v. Clark, 20 Cal. 11, 30, shows what payments made by a trustee out of his own funds, and what advances made to him by third persons, can be an equitable lien upon the trust property; namely, if the payment by himself, or the loan by the creditor, was not expressly authorized by the trust instrument, such payment or loan must be necessary for the preservation of the property, or to prevent a failure of the trusts. Noyes v. Blakeman, 6 N. Y. 567; 3 Sandf. 531; Randall v. Dusenbury, 63 N. Y. 645; 7 J. & S. 174 (39 N. Y. Super. Ct.); Stanton v. King, 8 Hun, 4; Worrall v. Harford, 8 Ves. 4, 8; Morison v. Morison, 7 De G. M. & G. 214; *Ex parte* Chippendale, 4 Id. 19; McNeillie v. Acton, Id. 744; Francis v. Francis, 5 Id. 108; Leedham v. Chawner, 4 K. & J. 458; *Ex parte* Rogers, 8 De G. M. & G. 271; Tennant v. Trenchard, L. R., 4 Ch. 537; *In re* Leslie's Trusts, Id., 2 Ch. D. 185. Notwithstanding these authorities, it seems to be held in Taylor v. Clark, 56 Ga. 309, that a trustee has no power to create a lien upon the estate nor upon the crops, for supplies furnished necessary to produce such crops; and in Steele v. Steele's Adm'r, 64 Ala. 438, that a trustee can not create a lien in favor of a creditor without *express* authority given; see also with respect to the general subject of liens, Starr v. Moulton, 97 Ill. 525; Robinson v. Hersey, 60 Me. 225; Bradbury v. Birchmore, 117 Mass. 569, 580–582; Rensselaer etc. R. R. v. Miller, 47 Vt. 146; Williams v. Smith, 10 R. I. 280, 283; Ryder v. Sisson, 7 Id. 341; Ferry v. Laible, 27 N. J. Eq. 146; Kearney v. Kearney, 17 Id. 59; as to the effect of a statute giving a creditor an action at law for services rendered to the trust estate, see Askew v. Myrick, 54 Ala. 30.

[1] For the details of this subject the reader must be referred to treatises upon trusts and trustees. The power is somewhat discretionary, and each case must largely depend upon its own circumstances. The settled doctrines of equity are fairly summed up in §§ 2279–2289 of the Civil Code of California, which are copied from the corresponding §§ 1208–1215 of the proposed New York Civil Code. These provisions are as follows: "§ 2279. A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful." § 2280. A trust can not be revoked after its acceptance, except by the

This power is confined to cases of actual express trusts. It can not, in the nature of things, extend to implied trustees, or trustees *in invitum;* nor does it apply to those persons who stand in fiduciary relations, and are for some purposes treated as trustees. A court of equity may remove a trustee on his own application when he wishes to be discharged; and it may and will remove a trustee who has permanently changed his residence to another country, or has absconded, or has been guilty of some breach of trust or violation of duty, or has become insolvent, or is incapable through age or other infirmity of performing the trust duties. The exercise of this function by a court of equity belongs to what is called its *sound, judicial discretion*, and is not controlled by positive rules, except that the discretion must not be abused.[1]

§ 1087. **Appointment of New Trustees.**—The principle has already been stated that an express trust, validly created, shall not fail for want of a trustee. Courts of equity, therefore, independently of statute, possess the inherent power and juris-

consent of all the beneficiaries, unless a power of revocation is reserved in the instrument of trust. "§ 2281. The office of a trustee is vacated by his death, or by his discharge. § 2282. A trustee can be discharged from his trust only as follows: by the extinction of the trust; by the completion of his duties under the trust; by such means as may be prescribed by the declaration of trust; by the consent of the beneficiary, if he had capacity to contract; by the judgment of a competent tribunal, in a direct proceeding for that purpose, that he is of unsound mind; or by the superior court [*i. e.*, by a court of general equity jurisdiction]. § 2283. The court may remove any trustee who has violated or is unfit to execute the trust; or may accept the resignation of a trustee. § 2287. The court may appoint a trustee whenever there is a vacancy, and the declaration of trust does not provide a practicable method of appointment. § 2288. On the death, renunciation, or discharge of one of several co-trustees, the trust survives to the others. § 2289. When a trust exists without any appointed trustee, or where all the trustees renounce, die, or are discharged, the court must appoint another trustee. The court may in its discretion appoint the original number, or any less number of trustees."

[1] People v. Norton, 9 N. Y. 176; *In re* Cohn, 78 Id. 248; Preston v. Wilcox, 38 Mich. 578; *In re* Bernstein, 3 Redf. 20 (resignation); North Car. R. R. v. Wilson, 81 N. C. 223; McPherson v. Cox, 6 Otto, 404; Satterfield v. John, 53 Ala. 127; Farmers' Loan etc. Co. v. Hughes, 18 N. Y. Sup. Ct. 130 (removing to a foreign country); Bloomer's Appeal, 83 Pa. St. 45; Sparhawk v. Sparhawk, 114 Mass. 356; Ketchum v. Mobile etc. R. R., 2 Woods, 532; Scott v. Rand, 118 Mass. 215; *In re* Adams' Trust, L. R., 12 Ch. D. 634; *Ex parte* Hopkins, Id., 9 Ch. 506; as to accepting a voluntary resignation, see Wilkinson v. Parry, 4 Russ. 272, 276; Coventry v. Coventry, 1 Keen, 758; Greenwood v. Wakeford, 1 Beav. 576, 581; Forshaw v. Higginson, 20 Id. 485; *In re* Stokes' Trusts, L. R., 13 Eq. 333; Chalmer v. Bradley, 1 J. & W. 51, 68; Cruger v. Halliday, 11 Paige, 314; Shepherd v. McEvers, 4 Johns. Ch. 136; Diefendorf v. Spraker, 10 N. Y. 246; as to removal in general, see Forster v. Davies, 4 De G. F. & J. 133, 138; *In re* Blanchard, 3 Id. 131; Palairet v. Carew, 32 Beav. 564, 567; Crombes v. Brookes, L. R., 12 Eq. 61; *In re* Roche, 2 Dr. & War. 287, and *In re* Watts's Settlem., 9 Hare, 106 (bankruptcy); as to foreign residence, see Mennard v. Welford, 1 Sm. & Gif. 426; *In re* Bignold's Trusts, L. R., 7 Ch. 223; Withington v. Withington, 16 Sim. 104.

diction to appoint new trustees whenever such action is necessary to protect the rights of the beneficiaries. In the absence of any other method prescribed by the instrument creating the trust, a court of equity will appoint trustees when none at all have been named by the creator of the trust; and will appoint new trustees when those originally named refuse to accept, or when a vacancy occurs by their death, resignation, permanent residence in a foreign country, or removal from office, as heretofore described.[1] The power of appointment will be exercised on behalf of a beneficiary who has a real interest, even though it be contingent. Its exercise, as in the case of removal, is a matter of sound judicial discretion. In filling vacancies, therefore, the court is not necessarily confined to the original number of trustees. In the appointment, as well as in the removal of trustees, the court keeps in view and endeavors to accomplish three main objects: the wishes of the creator of the trust, the interests of *all* the beneficiaries, not *some* of them; and the effectual performance of the trust. Even when the power of appointment is conferred by the instrument of trust upon an individual, a court of equity may control its exercise so as to prevent an abuse of discretion.[2]

[1] Leggett v. Hunter, 19 N. Y. 445, 459; *In re* Robinson, 37 Id. 261; Quackenboss v. Southwick, 41 Id. 117; *In re* Stevenson, 3 Paige, 420; *In re* Van Schoonhoven, 5 Id. 559; Mask v. Miller, 7 Baxt. 527; Green v. Blackwell, 31 N. J. Eq. 37; Att'y-Gen. v. Barbour, 121 Mass. 568; Ketchum v. Mobile etc. R. R., 2 Woods, 532; Collier v. Blake, 14 Kans. 250; Millard v. Eyre, 2 Ves. 94; Buchanan v. Hamilton, 5 Id. 722; Dodkin v. Brunt, L. R., 6 Eq. 580; Coombes v. Brookes, Id., 12 Eq. 61; *In re* Bignold's Trusts, Id., 7 Ch. 223; *In re* Tempest, Id., 1 Ch. 485. The court does not necessarily adhere to the original number, but may appoint more or less, unless the instrument of trust expressly requires the same number to be kept up. *In re* Tunstall's Will, 4 De G. & Sm. 421; D'Adhemar v. Bertrand, 35 Beav. 19; *In re* Welch, 3 My. & Cr. 292; Miller v. Priddon, 1 De G. M. & G. 335; Emmet v. Clark, 3 Giff. 32, 35; as illustrations of appointments, see *Ex parte* Countess of Mornington, 4 De G. M. & G. 537; *In re* Boyce, 4 De G. J. & S. 205; *In re* Price's Trust, L. R., 6 Eq. 460; Dodkin v. Brunt, Id., 6 Eq. 580; King of Hanover v. B'k of England, Id., 8 Eq. 350; *In re* Raphael's Trust, Id., 9 Eq. 233; *In re* Smirthwaite's Trusts, Id., 11 Eq. 251; *In re* Davis' Trusts, Id., 12 Eq. 214; *In re* Stokes' Trusts, Id., 13 Eq. 333; *In re* Driver's Settlement, Id., 19 Eq. 352; *In re* White, Id., 5 Ch. 698; *In re* Sparrow, Id., 5 Ch. 662; *In re* Donisthorpe, Id., 10 Ch. 55; *In re* Rathbone, Id., 2 Ch. D. 483; *In re* Dalgleish's Settlement, 4 Id. 143; *In re* Lamotte, Id., 4 Ch. D. 325; *In re* Hodgson, Id., 11 Ch. D. 888; *In re* Harford's Trusts, Id., 13 Ch. D. 135; *In re* Liddiard, Id., 14 Ch. D. 310.

[2] Bailey v. Bailey, 2 Del. Ch. 95.